Supreme Court of the United States

October Term, 1926.

No. [redacted] 53

GREAT NORTHERN RAILWAY COMPANY AND CENTRAL UNION TRUST COMPANY OF NEW YORK,

Appellants,

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

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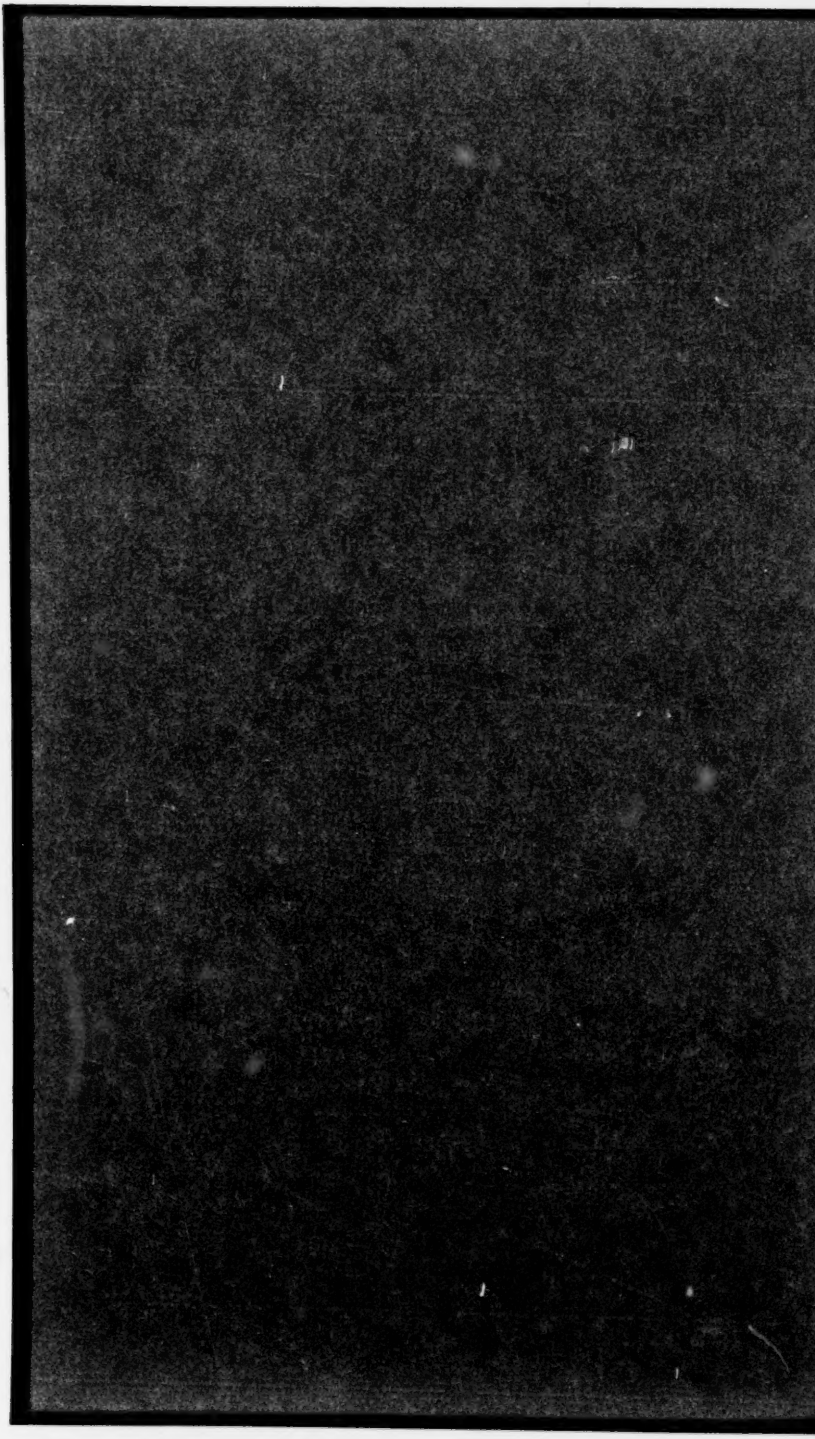

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Supreme Court of the United States

OCTOBER TERM, 1925.

GREAT NORTHERN RAILWAY COMPANY and CENTRAL UNION TRUST COMPANY OF NEW YORK,
Appellants,

vs.

HOWARD SUTHERLAND, as Alien Property Custodian of the United States,
Appellee.

No. 345.

BRIEF FOR APPELLANTS.

No Official Report of Opinion Below.

The court below filed a memorandum decision only (R. 38) which has not been officially reported.

The Jurisdiction of this Court.

This is an appeal from a decree of the District Court of the United States for the Southern District of New York, filed March 11, 1925 (R. 39-41) which (a) requires appellant, Great Northern Railway Company, to cancel upon its books and records the existing and still outstanding certificates for about 1,000 shares of its preferred capital stock, without presentation or surrender of such out-

standing certificates, and to issue new certificates in the names of depositaries of the Alien Property Custodian of the United States, (herein referred to as the Custodian), and (b) requires appellant, Central Union Trust Company of New York, (likewise without presentation or surrender of such outstanding certificates), to countersign such new certificates as Registrar of Transfers.

The decree of the court below was rendered in a proceeding instituted in October 1924 by the Custodian under Section 17 of the Trading with the Enemy Act,—frequently referred to herein as "the Act",—(Act of October 6, 1917, Ch. 106, 40 Stat. 411, 425, Fed. Stat. Anno. Supp. 1918, p. 865), and pursuant to Section 24 of the Judicial Code.

The granting of the relief sought by the Custodian was objected to by the appellants in the court below upon the following grounds, among others:

> That the Custodian did not make even a symbolic seizure of the shares in question during the war;
>
> That the Act would be unconstitutional because lacking in due process of law if construed as requiring the relief sought upon the fragmentary and insufficient determinations and demands of the Custodian during the war;
>
> That there was no adequate proof that the wartime proceedings were taken by the Custodian or under his authority;
>
> That the action attempted by the Custodian after the end of the war created no rights in him with respect to these shares and that the Act would be unconstitutional, because lacking in due process and also because not a justifiable exercise of the war power, if construed as authorizing the Custodian after the end of the war to create in himself rights as to these shares not created during the war;

That the Joint Resolution of July 2, 1921, ending the war neither created, nor authorized the post-war creation of, any rights in the Custodian in these shares; and

That the Treaty of Peace with Germany neither created nor authorized the post-war creation of any rights in the Custodian to these shares.

Review by this Court on direct appeal under Section 238 of the Judicial Code[1] is invoked upon the grounds that there are drawn in question (a) the construction and application of the Constitution of the United States, (b) the constitutionality of certain provisions of the Trading with the Enemy Act, and (c) the construction of the Treaties of Peace between the United States and Germany and between the United States and Austria (R. 41-45).

The constitutional and treaty questions presented are substantial and sufficient to support this Court's jurisdiction on direct appeal.

U. S. Trust Co. v. *Miller*, 262 U. S. 58;
Stoehr v. *Wallace*, 255 U. S. 239;
Seufert Bros. Co. v. *United States*, 249 U. S. 194.

Statement of the Case.

The case was submitted on the petition and the answers and on certain stipulations.

Appellant, Great Northern Railway Company, (hereinafter referred to as Great Northern), is a corporation of Minnesota and maintains an office for the transfer of its capital stock in the City of New York (R. 3). The right to obtain the transfer of shares of Great Northern stock, or

[1]Important amendments to this section were made by Act of February 13, 1925, effective May 13, 1925, but as the decree in this case was entered in the lower court, and this appeal was pending in this court, prior to the effective date of such amendatory act, it is not affected thereby. (For the Act of Feb. 13, 1925, see 266 U. S. 687, 694, 699.)

new stock certificates therefor, without surrender of the outstanding certificates, is not an attribute of property inhering in the owner of the shares, because under the law under which the capital stock was issued, not even the owner of the shares has any such right (R. 31, 34, 43).

Appellant, Central Union Trust Company of New York, (hereinafter referred to as Central Union Trust Company), is a corporation of New York, and is the Registrar of Transfers for the certificates of stock of Great Northern, such certificates not being valid until countersigned by the Registrar of Transfers (R. 3). As such Registrar it was, at all times set forth in the petition, and is, subject to an agreement with the New York Stock Exchange, as a condition of such Registrar being accepted by the New York Stock Exchange, that such Registrar will not register the transfer of Great Northern stock certificates without surrender of outstanding certificates (R. 35).

Great Northern filed with the Custodian, during the war, reports pursuant to the Trading with the Enemy Act (Act of Oct. 6, 1917, ch. 106, sec. 7 (a), 40 Stat. 411, 416, Fed. Stat. Anno. Supp. 1918, p. 853) giving lists of persons, believed to be enemies, who were the registered owners of specified numbers of its shares and stating that the actual location of the certificates representing said shares was unknown to it (R. 3, 7).

There were served upon Great Northern determinations and demands purporting to have been issued by the Custodian and determining that the registered owners specified in such reports were enemies or allies of enemies, each having a certain right, title and interest in and to a specified number of such shares, and requiring Great Northern to convey, transfer, assign and deliver to the Custodian such right, title and interest in said stock (R. 4, 5, 7) including such right as such enemy might have to receive notices, exercise voting power and receive dividends. These documents directed Great Northern to remit to the Custodian all payments, whether of capital or income,

now or hereafter declared or due on account of the shares and also to remit to the Custodian any dividends on such shares and to send the notices demanded to the Custodian's depositaries. These determinations and demands were all in the same form (R. 11, 15, 20). A copy of one, typical of all, is set forth in the appendix.[1]

Great Northern also filed with the Custodian a report pursuant to the Act to the effect that Lieber & Co., believed to be an enemy, was believed to be the beneficial owner of specified shares standing in the name of A. Biedermann & Company, (not determined to be an enemy), as registered owner (R. 8). Following such report, there was served on Great Northern a determination and demand (R. 9) purporting to have been issued by the Custodian, and identical in form with those above referred to, except that instead of dealing with such interest as A. Biedermann & Company, registered owner, might have in the shares mentioned in such report, it dealt with such interest as Lieber & Company might have therein (R. 25).

On November 4, 1918 an amendment was adopted to Section 7(c) of the Act, which amendment the Custodian claims gave him the right to compel the transfer of corporate shares without surrender of outstanding certificates. As to a part of the shares involved herein, the determinations and demands above mentioned were made prior to that amendment. As to the other shares involved herein, the determinations and demands were made after such amendment and in 1919.

All of the determinations and demands above mentioned were made prior to the making of peace, and none of them determined that the shares mentioned therein belonged to

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[1]See Appendix A, p. 41, *infra*.

Appellants deny the authenticity of all the war-time demands and determinations purporting to have been made herein by the Custodian, but for convenience and brevity such war-time documents are sometimes herein characterized as if duly executed by the Custodian, this being without prejudice to the distinct point that the due execution of the war-time demands and determinations is denied herein and has not been proved.

enemies or allies of enemies, or demanded the transfer of the shares themselves or the cancellation of the outstanding certificates or the issue of new certificates. All these determinations and demands showed expressly that transfer of the stock certificates was not sought or contemplated thereby, containing the statement that the demands were without prejudice to "any demand accompanied by such certificates" (R. 14, 18, 23, 28).

All of such determinations and demands purport to show that they were signed in ink by the "Managing Director" of the Custodian. But there was no proof that they were in fact signed by the Managing Director in person. It is stipulated (R. 36) that the seal of office of the Custodian was affixed to all the demands.

Following the service of these demands, Great Northern paid and has continued to pay to the Custodian all dividends declared on the shares of stock mentioned in said demands (R. 5, 7, 9).

Great Northern made no transfers upon its books and issued no new certificates in respect of any shares mentioned in any of the foregoing determinations and demands, except in instances where the Custodian took the additional step of reducing the outstanding certificates to his physical possession and thereupon tendered the same for surrender and requested in lieu thereof the issue of new certificates (R. 5).

There were no further determinations and demands made by the Custodian until 1924, long after the making of peace, when the Custodian executed and served upon Great Northern in respect of the shares in question additional documents wherein the Custodian recited (contrary to the true effect of his former action) that he had theretofore determined that the shares in question were held for the specified enemies, and wherein the Custodian demanded (for the first time) that Great Northern cancel upon its books the said shares and in lieu thereof issue new certificates to designated depositaries (R. 18, 23, 28). A copy of one of these documents, the others being in all

respects substantially similar (R. 18, 23, 28), is set forth in the appendix.[1] By these steps taken in 1924 the Custodian for the first time undertook to determine that the shares in question themselves belonged to enemies or allies of enemies, and for the first time sought the transfer of those shares or the cancellation of the old certificates or the issue of new ones.

The Custodian concedes that he has never had possession of the outstanding certificates for the stock mentioned in his 1924 demands, and that the location of the same is unknown to him (R. 6, 8, 9), and appellants do not know who are the present holders and owners thereof (R. 32, 35). The stock certificates now outstanding for the shares here involved have been, ever since their issue, subject to transfer to bona fide holders for value, who may be citizens of the United States or of friendly nations, and have also been subject, since their issue, to capture or seizure by the authorities of the nations associated with this country in the World War (R. 32, 35).

Great Northern refused to comply with the Custodian's demands of 1924, and took the position that it would not issue new certificates for its shares of stock except upon surrender and cancellation of the existing and outstanding certificates therefor. Central Union Trust Company as Registrar took a like position.

To compel compliance with these demands, the Custodian thereupon filed a petition in the District Court in which he made application for an order and decree directing Great Northern to issue new certificates to the Custodian or his depositaries, and directing Central Union Trust Company as Registrar to countersign the new certificates when issued.

The District Court entered an order or decree granting the relief prayed for by the Custodian (R. 39). Appel-

[1] See Appendix B, page 46, *infra*.

lants then asked and were allowed a direct appeal to this Court (R. 45).[1]

Specification of Errors.

We specify all of the assignments of error, which will be found in the Record at pages 41 to 45, and urge all of them upon the Court's consideration.

For the sake of clarity and brevity we have in the following argument rearranged, and to some extent consolidated, the points covered by the assignments of error.

THE ARGUMENT.

The transfer of shares of stock upon a corporation's books and the issue therefor of new certificates without the surrender of the outstanding certificates and the countersigning of such new certificates by the Registrar of Transfers are steps of grave importance, running counter to the established methods of business and the recognized rights of all parties and these steps must be taken at the peril of the corporation and its Registrar. They can receive no protection under the Trading with the Enemy Act unless they can show that they took the steps in reliance upon acts of the Custodian which were within his powers and in due and proper form under those powers. It is hence important that the scope of the Act and the effect and validity of the Custodian's determinations and demands herein shall be authoritatively passed upon.

We deny the authenticity of all the Custodian's wartime determinations and demands purporting to have been made herein by the Custodian and make that a distinct point.' But in general our attack upon the legal effective-

[1]Mr. Thomas W. Miller ceasing to be Custodian, Mr. Howard Sutherland, successor in office, was substituted as petitioner and appellee by order of this Court, entered March 1, 1926.

ness of those determinations and demands is intended to apply even though they had been proved to be duly executed by or for the Custodian.

The lower court held that the determinations and demands were sufficient under the Act and under the Constitution.

In order to develop satisfactorily the constitutional questions as well as the questions of application of the statute, it will be helpful first to present the broad proposition that in the light of the facts there was no seizure of the corpus of the shares during the war.

Summary of Argument.

There was no seizure of the corpus of the shares during the war.

> The distinction here presented between seizure of the corpus and demand for merely an undefined interest has not been passed upon by this Court.
>
> The distinction between seizure of the corpus and demand for merely an undefined interest has been recognized by lower courts.
>
> The history of the Custodian's proceedings herein shows that he was not effecting a seizure of the shares themselves.
>
> In the two Circuit Court of Appeals decisions upholding transfers of shares without surrender of certificates the Custodian had determined the enemy ownership of the corpus of the property and had demanded the transfer of that corpus.
>
> The insufficiency of the Custodian's determinations and demands is further illustrated by his own action in some instances in reducing other certificates to his physical possession, surrendering same and requesting new ones.
>
> The Custodian should not be permitted to cure his lack of determination and demand as to the shares themselves by indulging in inferences from his demands as to dividends, etc.

It would violate the Constitution to require transfer of the shares themselves and issue of new certificates therefor.

There was not even that irreducible minimum of due process which is requisite even in time of war.

The Custodian's action if upheld vests a right in him which is not possessed even by the owner of the shares.

The amendment of November 4, 1918 to Section 7(c) would be unconstitutional, because retroactive, with reference to the shares mentioned in those determinations and demands which were made prior to that amendment.

But the Act, properly construed, does not sustain the relief granted below, so it should be unnecessary to deal with these constitutional questions.

The Custodian's acts did not measure up to the requirements of Section 7(c) as amended upon which he relies.

The provisions of Section 12 are inconsistent with the implied meaning which the Custodian attributes to Section 7(c) as amended.

The Custodian's action confirms view that statute does not apply.

The due execution of the war-time determinations and demands is denied.

No action after the war could or did create any right in the Custodian with respect to these shares.

The post-war action attempted by the Custodian created no right in him under the Act, and that Act would be unconstitutional if construed as authorizing the post-war creation of rights by such action.

The Joint Resolution of Congress of July 2, 1921 should not be construed as giving the Custodian power to create additional rights in himself after the end of the war, and would be unconstitutional if so construed.

The Treaties of Peace should not be construed as giving the Custodian power to create in himself after the end of the war the rights he asserts in this proceeding.

THERE WAS NO SEIZURE OF THE CORPUS OF THE SHARES DURING THE WAR.

The Custodian seeks here to enforce a transfer of the shares themselves. He never determined during the war that the shares themselves belonged to or were held for an enemy, or demanded the transfer of the shares themselves. On the contrary he merely determined that the enemy had "a certain right, title or interest", wholly undefined, in the shares and demanded the transfer of that undefined interest and nothing more. As we shall show below, the entire history of the Custodian's dealing with the subject demonstrates that he had no intention during the war to determine enemy ownership of the shares themselves or to demand their transfer. We therefore claim that there was never any symbolic seizure of the shares themselves during the war, and hence that the Custodian never created in himself during the war such a right to the shares themselves as could serve as a basis for compelling their transfer to him and the cancellation of the old certificates and the issue of new certificates.

The distinction here presented between seizure of the corpus and demand for merely an undefined interest has not been passed upon by this Court.

This proposition is different from any proposition presented to or passed upon by this Court in any of the cases arising under the Trading with the Enemy Act. This is true because in all the cases before this Court there has been no question that the Custodian's action was adequately directed toward the specific thing that was sought.

Thus in *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, the main effort was to secure a judicial reopening of the Custodian's determination of enemy ownership, but there was no question that the Custodian's determination dealt with the specific item of property which he was seeking under Section 17 of the Act to obtain. In *Stoehr* v. *Wallace,* 255 U. S. 239, the attack was on the *ex parte* character of the determination, but it is not questioned that the determination related to the very thing that the Custodian was undertaking to sell. In *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, the effort was to question, in a suit under Section 17 of the Act, the correctness of the Custodian's determination, but it was not disputed that the determination had dealt with the very thing the Custodian was seeking. In *American Exch. Nat. Bank* v. *Garvan,* 273 Fed. 43, affirmed as *Simon* v. *American Exchange National Bank,* 260 U. S. 706, the effort was to question the Custodian's determination by a bill of interpleader, but there was no dispute as to the subject matter of the Custodian's determination.

We maintain that when the Custodian determines merely that an enemy has a certain but wholly undefined interest in the shares, that is not equivalent to determining that the shares belong to or are held for the enemy. Any interest by the enemy, however remote or contingent, might satisfy such a determination, and yet the shares might in fact belong to and be held for another not an enemy. Likewise, a demand that the corporation assign such an undefined interest is not a demand that the shares themselves be transferred, and particularly when the Custodian makes no effort to obtain a new certificate and in fact expressly indicates that he is not making any such effort.

The distinction between seizure of the corpus and demand for merely an undefined interest has been recognized by lower courts.

This distinction between seizing the *corpus* (in this case the shares themselves) and seizing a mere undefined interest in such corpus has been recognized by the lower courts.

In *Miller* v. *Rouse,* 276 Fed. 715 (District Court, S. D. New York), one of the demands considered merely determined that the enemy had "a certain right, title, and interest as a beneficiary" under a will, and duly demanded such interest. The Court held that this capture did no more than substitute the Custodian in the place of the beneficiary, and that he became entitled to all rights which the enemy had as beneficiary and no more.

In *Kahn* v. *Garvan,* 263 Fed. 909 (District Court, S. D. New York), the Custodian had determined that each of three enemies had a certain right, title and interest under a deed of trust placing certain securities with a trustee. The Custodian demanded of the trustee that every such right, title and interest be conveyed to the Custodian. The trustee sued the Custodian for an accounting. The Custodian resisted the demand. The Court pointed out that the demand of the transfer of "right, title and interest" did not profess to be greater than the right of the enemies and that the Custodian could not under such a demand, "or unless he asserted a legal right to the securities themselves, by capture change the character of the enemy's right as obligee" (p. 912). The Court further said:

> "The Alien Property Custodian urges that the case of *Garvan* v. *$25,000 Mortgage Bonds, supra,* is to the contrary. I think not. There he had determined that he was entitled, not to whatever rights as *cestuis que trustent* the German insurance companies had, but to the very corpus of the *res.* The court decided that the investigation and decision of the Alien Property Custodian was conclusive, and that the capture went as far as it purported to go, and required delivery of possession, under

> rule 2(c). Had the Alien Property Custodian in this case demanded, as he most properly did not do, out of the hands of the plaintiff, the securities themselves, a question would arise, similar to that in *Garran* v. *$25,000 Mortgage Bonds, supra*, and *Salamandra, etc., Co.* v. *N. Y. Life Ins. & Trust Co.* (D. C.), 254 Fed. 852, whether any inquiry whatever was justiciable into the validity of the conclusion of the Alien Property Custodian, or whether there was any remedy at all except by suit brought under section 9. In the case at bar all he claimed was the acknowledged rights of enemies, and these were, as I have said, conditional upon some such proceeding as is here instituted" (p. 913).

In the case of *Garran* v. *$20,000 Bonds*—referred to in the case just cited as *Garran* v. *$25,000 Bonds*—265 Fed. 477 (C. C. A., 2nd Circuit), subsequently affirmed as *Central Union Trust Co.* v. *Garran*, 254 U. S. 554, an enemy insurance company had deposited securities with certain states as a condition of doing business therein. The Custodian determined that the securities themselves belonged to the insurance company or were held for its benefit, and made a demand for the property. The Court enforced the demand.

In the case at bar the Custodian did not determine that the shares themselves belonged to the enemy or were held for his benefit and did not demand that such shares be transferred to him. He merely determined that the enemy had a certain interest—undefined—and demanded the transfer of that interest.

The history of the Custodian's proceedings herein shows that he was not effecting a seizure of the shares themselves.

Further demonstration that the Custodian was not effecting, or intending to effect, a seizure of the shares in question themselves, through a determination and demand contemplating their transfer to him, is derived from the history of the Custodian's proceedings herein in

the light of the Amendment of November 4, 1918 to Section 7(c).[1] That Section, as will be later pointed out, is relied upon by the Custodian as authorizing him to demand the issue of new certificates for corporate stock without surrender of old and outstanding certificates.

Five hundred thirteen of the shares dealt with by the decree were mentioned in determinations and demands made prior to November 4, 1918, and these were the only determinations and demands made in respect of such shares during the war.

Prior to November 4, 1918, and at the time of the determinations and demands affecting these 513 shares, the Act unquestionably contemplated that certificates for new shares should be issued only upon the surrender of the old certificates.

Section 12 of the Act made it the duty of every corporation to transfer its shares upon its books into the name of the Custodian "upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests". (Act of Oct. 6, 1917, as amended by Act of March 28, 1918, Ch. 28, 40 Stat. 460; Fed. Stat. Anno. Supp. 1918, p. 863.) There is no claim that there was at that time any other provision of the Act modifying the method thus clearly prescribed.

When the Custodian made these determinations and demands he knew that he could not call for a transfer of the shares and the issue of new certificates without the surrender of the outstanding certificates, and he made no effort to lay a foundation for such a procedure which was not then even in contemplation.

The remaining 606 shares dealt with by the decree are mentioned in determinations and demands made during the war, but after November 4, 1918. These determinations and demands are identical in form with those which were made before that amendment, and make no deter-

[1]Section 7 (c) as amended by Act of November 4, 1918, is set forth in the margin, page 28, *infra*.

mination of the ownership of the shares, no demand for their transfer, or for the issue of new certificates, and indicate that such transfer and such issue of new certificates was not in contemplation unless the outstanding certificates were surrendered. The fact that these determinations and demands are similar in all respects to those which were made when the Custodian could have no idea that he could obtain a transfer of the shares and the issue of new certificates without surrender of outstanding certificates emphasizes that the Custodian did not contemplate, at the time he made these determinations and demands, that he was laying a basis for obtaining any such transfer of the shares and issue of new certificates.

That no seizure of the corpus of the shares involved in this proceeding was effected appears with special clearness in the case of the determination and demand, made in May, 1919, mentioning shares standing in the name of A. Biedermann & Company (R. 9, 27). This determination and demand relates to 596 shares, or more than one-half of the total number of shares involved in this litigation. There is no determination therein that A. Biedermann & Company was an enemy. On the contrary it is merely determined that Lieber & Company was an enemy and had an undefined right, title and interest in the shares, and it is demanded that Great Northern transfer to the Custodian such right, title and interest as Lieber & Company had therein. There is no determination that A. Biedermann & Company, the registered owner, is without any interest in the shares.

The demand that the undefined interest of Lieber & Company be transferred to the Custodian is particularly blind and futile, leaving the corporation without any basis for knowing what interest to assign to Lieber & Company and what interest to regard as still remaining to A. Biedermann & Company.

The Custodian's counsel say that Great Northern had reported to the Custodian that it believed, (or had reason

to believe) that Lieber & Company was the beneficial owner of the shares. This, however, was a mere surmise of the corporation. The Custodian was not willing to give the corporation the benefit of a determination that Lieber & Company was the beneficial owner. The Custodian preferred the wholly indefinite determination that Lieber & Company had "a certain right, title and interest". It was the Custodian's determination that was the official and binding act, and not the surmise which the corporation made in order to give the Custodian an opportunity to make such determination as he thought the situation justified.

In the two Circuit Court of Appeals decisions upholding transfers of shares without surrender of certificates the Custodian had determined the enemy ownership of the corpus of the property and had demanded the transfer of that corpus.

Circuit Courts of Appeals for the Second and Fifth Circuits, in the cases cited next below, upheld war-time demands for transfer of shares without surrender of outstanding stock certificates. Postponing discussion of our contention that those decisions were erroneous in their construction of the Act, we point out here that in those cases there has been an effective war-time seizure of the corpus of the shares.

In *Columbia Brewing Co.* v. *Miller,* 281 Fed. 289 (C. C. A., 5th Circuit), the Custodian determined during the war that the shares in question belonged to enemies, declared that he seized those shares, and required that they be transferred to him, and that the same be cancelled upon the company's books and that new certificates be issued.

In *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft,* 283 Fed. 746 (C. C. A., 2nd Circuit), the Custodian's war-time determination was that all the rights created by the voting trust and every right in the company whose

shares were in the voting trust were held for the enemy. The Custodian declared that he seized all the beneficial interests covered by the voting trust and represented by the voting trust certificates, and he required the voting trustees to convey to him all such interests and to cancel upon their books all such interests, and in lieu thereof to issue certificates to the Custodian.

Thus in every vital particular the war-time determinations and demands in those cases differed fundamentally from those in the case at bar. In both of those cases the Custodian held that the corpus of the property belonged to the enemy; here he merely held that the enemy had an undefined interest. There, the Custodian formally declared that he seized the property itself; here there is no such declaration. There the Custodian required a transfer of the shares themselves; here he merely calls for a transfer of the undefined and unknown interest which he says the enemy owns. There he called for the concellation upon the company's books of the interest standing in the name of the enemy and in lieu thereof for the issuance of certificates to the Custodian; here there is no such requirement but the plain implication that an issuance of certificates to the Custodian is not in order.

The particularity with which the determinations and demands in the *Columbia Brewing* and *Kaliwerke* cases correspond with the phraseology of the amended Section 7(c), further emphasizes that the Custodian, when he made the determinations and demands involved herein, was not attempting to create the rights which he conceived he could establish under Section 7(c). The determinations and demands in the two cases cited and in form corresponding with the phraseology of amended Section 7(c) were made in the month of March, 1919, and during the period January to June, 1919, respectively, while the Custodian, continuing his uniform policy as to shares involved in this proceeding, made determinations and demands

herein in January and May, 1919, adhering to the form he had adopted prior to the amendment to Section 7(c).[1]

The very fact that in the two cases last cited the Custodian employed forms specifically effecting seizures of the shares themselves, while concurrently using as to the Great Northern shares a fundamentally different form which did not purport to effect any such seizure of the shares themselves, emphasizes that as to the Great Northern shares the Custodian was not attempting to effect a seizure of the shares themselves.

The insufficiency of the Custodian's determinations and demands is further illustrated by his own action in some instances in reducing other certificates to his physical possession, surrendering same and requesting new ones.

The record shows that from time to time the Custodian, having reduced stock certificates mentioned in his determinations and demands to his physical possession, surrendered the same to Great Northern, and requested new certificates, and that thereupon Great Northern issued new certificates in lieu of those surrendered (R. p. 5). This action brings out in clear relief the Custodian's own conception that the determinations and demands now under consideration did not of themselves constitute such a seizure of the shares themselves as to entitle him to demand a transfer of those shares and the issue of new certificates without surrendering the outstanding certificates. The Custodian's practical course was that he did not seek a transfer of shares until he had made an effective capture, and that when he had made such a capture he sought a transfer of the shares through the surrender of the old cer-

[1]The case of *Miller* v. *United States*, 11 Wall. 268, which arose under the Confiscation Act of 1862, is relied upon in the *Kaliwerke* case. But in the *Miller* case the Government made an actual seizure of the shares themselves by duly serving a *notice of seizure of the stock* upon the corporation. It is the absence in the case at bar of any war-time seizure of the shares themselves that renders the *Miller* case as well as the *Kaliwerke* case inapplicable.

tificates. The Custodian made no attempt to obtain transfer of the shares upon the basis of his indeterminate wartime proceedings until more than two years and a half after the war had ended.

The Custodian should not be permitted to cure his lack of determination and demand as to the shares themselves by indulging in inferences from his demands as to dividends, etc.

The main contention of the Custodian's counsel is that the Custodian's demand must be regarded as a demand for the transfer of the shares themselves because, counsel says, the Custodian demanded specifically all the interests which were represented by the shares themselves, and hence the argument is that having demanded all the parts, the Custodian in effect demanded the whole. But this argument cannot be sustained.

As to notices and voting rights, the Custodian demanded nothing whatever beyond "the right which the said enemy may have".

As to dividends, the Custodian specifically instructed Great Northern to remit accumulated dividends and future dividends. A fundamental distinction between demanding the dividends and demanding the shares themselves is that the demand for dividends was in its nature a temporary demand, good only so long as Congress saw fit to continue to assert this extraordinary power over the income of the ex-enemy, while the demand for the shares themselves would operate in perpetuity.

A demand for the dividends was not an inappropriate provisional measure to adopt until such time as the Custodian should see fit to determine that the shares themselves were the property of the enemy and to demand and obtain their transfer to him, or to give a release from this provisional impounding of income.

Moreover, at least as to all the shares involved except those standing in the name of A. Biedermann & Company, it was the natural and normal thing for dividends to be paid to the registered owner. Since the Custodian had determined that the registered owner was an enemy, it was not inappropriate for the Custodian to call for the payment of the dividends.

Opposing counsel lay great stress upon the provision in the determination and demand that "until otherwise directed, you will remit" to the Custodian "all payments, whether of capital or income", now or hereafter declared or due. Opposing counsel indicate that if Great Northern should be dissolved during the period of the continuance of the Custodian's powers, the Custodian would obtain by virtue of this demand the entire distributive interest payable on account of the shares in question. This by no means follows. In the exceedingly remote contingency, (so remote as to be negligible), of Great Northern being dissolved and its assets liquidated and distributed, it is clear that Great Northern would be forced to take the position that the Custodian stood only in the shoes of the enemy whose undefined interest he had purported to deal with. The case would be in all respects similar to *Miller* v. *Rouse* and *Kahn* v. *Garvan, supra.* The Custodian could then obtain only such interest as was then coming to the enemy.

Here also there emerges the fundamental distinction between a demand having a presumably temporary operation and a demand having an operation in perpetuity. The theory of the Trading with the Enemy Act was that it was a war-time measure and that the affairs under it would be wound up within some appropriate period after the end of the war. It certainly was not the intention that the Custodian would continue in perpetuity in possession of rights to share in distribution of funds and estates. Upon any final winding up of the Custodian's

office it would follow that where the steps he had taken merely entitled him to obtain income or shares of principal distributed during the existence of his office, the right would be at the end when the office was wound up. Therefore the Custodian would not get by any such demand anything which would inure to his benefit after the expiration of his office. But if such demand, obviously thus limited in point of time, should be construed as giving him the right to the shares themselves, (although he never determined that the shares themselves belonged to the enemy and never demanded their transfer to him during the war), this would turn his action having on its face a temporary and limited action into an action having a perpetual operation and effect. Of course if the Custodian acting within his powers determines that the property itself belongs to the enemy and demands the transfer of that property to him, he thereby effects a seizure of that property which may be perpetual in its significance. But this is no reason why action having a temporary aspect should be unnecessarily regarded as equivalent to action, not taken, which might have had a perpetual aspect.

IT WOULD VIOLATE THE CONSTITUTION TO REQUIRE TRANSFER OF THE SHARES THEMSELVES AND ISSUE OF NEW CERTIFICATES THEREFOR.

There was not even that irreducible minimum of due process which is requisite even in time of war.

The courts have naturally gone very far in upholding seizures under war power. They have held in effect that the enemy has no constitutional right to be protected, and that it is sufficient if all other persons have the right to apply to the courts, (under Section 9 of the Act)[1], to get back what the Custodian has taken.

But even these views proceed upon the idea that while the proceeding for effecting seizure may be and indeed must be of a summary character, even resting largely upon

[1]Act of Oct. 6, 1917, Ch. 106, 40 Stat. 411, 416, as amended by Act of March 4, 1923, Ch. 285, 42 Stat. 1511, Fed. Stat. Anno. Supp. 1923, p. 118.

an *ex parte* determination by the Custodian or his representative, nevertheless there runs through the cases the idea that there must be a procedure to which parties may look and upon which they may rely.

Thus in *Miller* v. *United States*, 11 Wall. 268 (cited *supra*, p. 19) this Court went to the fullest length in upholding the war power to effect the seizures, but yet took great care to point out that the summary procedure provided was a procedure of an orderly and appropriate character.

In *Alexandria* v. *Fairfax*, 95 U. S. 774, another case arising under the Confiscation Act of 1862, and cited approvingly by opposing counsel, this Court held that the seizure of a debt owed by the City of Alexandria, Va., was invalid, because notice of the seizure had been made by serving the auditor of the City, whereas service should have been made upon some officer of the municipality such as the Mayor, on whom a similar service would bind the municipality in an ordinary suit. The Court stated:

> "But an incorporated city is not an individual, and service of notice or process on one of its citizens is not service on it. It has its officers, who speak and act for it by authority of law; and some one of these officers, either by an express statutory provision, or by the nature of their functions, is the proper person on whom all notices and processes necessary to bind it by judicial proceedings must be served.
>
> "It would seem to be reasonable that in proceedings *in rem* to confiscate property in the absence of its owner, where the seizure of it is a *sine qua non* to the jurisdiction of the court, and where, as in the present case, actual manucaption is impossible, the evidence which supports a constructive seizure should be scrutinized as closely, and be of a character as satisfactory, as that which would subject the party holding the fund or owing the debt which is the object of the proceedings to an ordinary civil suit in the same court" (p. 779).

We grant that in general when the Custodian during the war determines that described property is held for an enemy and demands that that property be assigned to him, this constitutes an orderly though summary procedure, which is not lacking in due process of law in the face of the war power. But if during the war the Custodian does not determine that the very property in question is held for the enemy and does not demand that that very property shall be transferred to him, we submit that there is a fundamental lack of due process of law if after the war, when the Custodian has lost all power to make new determinations and demands, he is permitted to enlarge his war-time determinations and demands and say that he determined more than his determinations then indicated and that he demanded or now demands more than his demands then specified.

But the case is even stronger from the standpoint of a corporation which is seeking to protect the integrity of its stock books.

A corporation which transfers its shares without the surrender of outstanding certificates has to act at its own peril and must be prepared to defend itself against all those who claim under the old and still outstanding certificates. Section 9 of the Trading with the Enemy Act makes no provision for giving such a corporation an opportunity to secure protection of its rights by a direct application to a court. The corporation would have to wait until its action was questioned and in event of being sued, it would have to show, under Section 7(e)[1], in order to prevent the maintenance of the suit, that the Custodian's action with which it had complied *was under the authority*

[1]Sec. 7 * * *

"(e) No person shall be held liable in any court for or in respect to anything done or omitted *in pursuance of* any order, rule, or regulation made by the President *under the autaority of this act.* * * *" (Italics ours.) (Act of Oct. 6, 1917, Ch. 106, 40 Stat. 411, 416, Fed. Stat. Anno. Supp. 1918, p. 856.)

of the Act. Hence the Act should require the Custodian's action to be sufficiently direct and positive to afford a basis of definiteness and certainty to the corporation. Unless the Act prescribes a reasonably definite procedure, no fair degree of even indirect protection is afforded to the corporation, and such a situation would be lacking in due process of law.

The Custodian's action if upheld vests a right in him which is not possessed even by the owner of the shares.

The peculiar subject matter must be borne in mind. If the Trading with the Enemy Act as amended gives the Custodian the power to require the transfer of shares of Great Northern stock without the surrender of the outstanding certificates, that Act creates in the Custodian in respect of those shares a new right which he could not derive from any owner thereof.

Every stock certificate which has ever been issued by Great Northern contains a provision that it is "transferable only on the books of the company in person or by attorney and upon surrender of this certificate" (R. 31). The company's by-laws provide that its shares "shall be transferred only on the books of the company by the holder thereof in person or by his attorney, upon surrender and cancellation of certificates for a like number of shares" (R. 31). These conditions have been imposed by the company under its charter, a special act of the legislature of Minnesota (Laws of Minnesota, 1856, Ch. CLX; R. 31), and constitute property attributes inhering in the shares and in the stock certificates which are evidences thereof.

While in the face of the war emergency it may be competent for Congress, acting under the war power, to empower the Custodian to deal with existing property rights, we submit that Congress has no power to give the Custodian property rights which do not already exist.

The fact that the rights of the owner of shares of Great Northern stop short of the right to transfer such ownership without surrender of the outstanding stock certificate grows out of fundamental practical considerations which are substantial and which deserve protection. The corporation, in the interest of all its stockholders, and in the interest of financial transactions generally, ought to possess the right to protect the integrity of its stock books and insure the orderly conduct of its dealings with all its stockholders.

As illustrative of the materiality of these considerations in the business world, Section 174 of the Personal Property Law of the State of New York, where Great Northern maintains an office for transferring certificates of its stock, provides that except where a certificate is lost or destroyed, the corporation "shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it." Great Northern's shares are listed upon the New York Stock Exchange, and if the Custodian should get new certificates for any such shares and should seek to dispose of them, he would doubtless sell them upon the New York Stock Exchange. The Central Union Trust Company, Registrar of Great Northern stock, is under agreement with the New York Stock Exchange whereunder such Registrar, as a condition of being accepted as such by the New York Stock Exchange, is obligated not to register the transfer of stock certificates of Great Northern without the surrender of the certificates outstanding therefor (R. 35).

The question whether Congress, acting under the war power, could create in the Custodian as the holder of enemy property such an attribute of ownership which neither an enemy owner nor any other owner of such property did or could enjoy, is a question which does not appear to have been passed upon by this Court, because in the alien property cases which have been passed upon, this Court was

dealing merely with the question of the Custodian's right to succeed to those elements of property which he could derive from the owner of the property. In *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56, this court stated:

> "And besides, under the act, it is to be remembered, the Custodian succeeds to all the rights in the property to which the enemy is entitled as completely as if by conveyance, transfer or assignment. . . ."

In *Miller* v. *Rouse,* 276 Fed. 715, 716, the District Court, through Judge LEARNED HAND, held that the effect of a demand for the interests of a beneficiary under a will was to substitute the Custodian for the beneficiary and to entitle the Custodian to the rights which the beneficiary had under the will, and no more.

Miller v. *United States,* 11 Wall. 268 (cited *supra*), a case which arose under the Confiscation Act of 1862, is cited by opposing counsel as standing for the proposition that the Government can require the issuance of new certificates for seized stock without the surrender of the old and outstanding certificates. But while the decree in that case might have purported to require such action, the distinct constitutional question here being discussed was neither presented nor passed upon. Hence that case should not be regarded as at all controlling on the case at bar.

The amendment of November 4, 1918 to Section 7(c) would be unconstitutional, because retroactive, with reference to the shares mentioned in those determinations and demands which were made prior to that amendment.

Five hundred thirteen shares of the total amount involved in this proceeding were covered by determinations and demands made by the Custodian prior to the date of the amendment to Section 7(c), and this action of the Custodian was not supplemented by any other action taken as to those shares before the end of the war. When

the Custodian took such war-time action as he did take with respect to these shares, there was no basis in the statute for requiring a transfer of the shares themselves without surrender of the outstanding certificates, and there was no intention upon the part of the Custodian to effect any such transfer. It is submitted that the status then established could not be altered and additional rights in the Custodian created by the subsequent enactment of a new statute.

BUT THE ACT, PROPERLY CONSTRUED, DOES NOT SUSTAIN THE RELIEF GRANTED BELOW, SO IT SHOULD BE UNNECESSARY TO DEAL WITH THESE CONSTITUTIONAL QUESTIONS.

The constitutional questions above discussed need not be met, because the proper construction of the statute itself shows that the relief here sought should not be allowed. The court always prefers, when justified in doing so, to construe a statute so as to avoid a constitutional question. *Harriman* v. *Interstate Commerce Com.*, 211 U. S. 407, 422.

The Custodian's acts did not measure up to the requirements of Section 7(c) as amended upon which he relies.

The Custodian bases his right to the relief here sought upon Section 7(c) of the Act as amended November 4, 1918.[1]

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[1]The new matter added November 4, 1918 is shown in italics:

"Sec. 7 * * *

(c) If the President shall so require any money or other property *including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description* owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, *or the same may be seized by the Alien Property Custodian; and all property*

The facts shown in this case do not meet the requirements of the statute. In brief, the statute provides:

> Whenever any such property shall consist of shares in any corporation, it shall be the duty of the corporation to cancel upon its books all shares standing in the name of any person who shall have been determined by the President to be an enemy, and which shall have been required to be transferred to the Custodian, or seized by him, and in lieu thereof to issue certificates to the Custodian.

The opposing counsel claim that the duty on the part of Great Northern to cancel the old certificates, transfer the shares to the Custodian, and issue new certificates, arose automatically upon the passage of the amendment as to the determinations and demands theretofore made, and automatically upon the making of the subsequent

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thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

"Any requirement made pursuant to this Act or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered or recorded.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require." (Act of October 6, 1917, ch. 106, 40 Stat. 411, 416, as amended by Act of Nov. 4, 1918, ch. 201, 40 Stat. 1020, Fed. Stat. Anno. Supp. 1919, pp. 355-356.)

determinations and demands which were made during the war. But this could not be true unless the requirements of the statute were satisfied by these war-time determinations and demands of the Custodian, and these war-time determinations and demands wholly failed to satisfy these requirements. These shares were not required by such determinations and demands to be transferred to the Custodian, nor had they thereby been seized by him, as has been above pointed out. Hence the statute had no operation whatever upon the situation here created.

Moreover, in another respect a requirement of the statute was not met, at least as to the Biedermann stock. The *statute had no application except as to stock, standing in the name of a person who had been determined to be an enemy, or held for, on account of, or on behalf of, or for the benefit of, a person so determined to be an enemy.* The Biedermann stock did not stand in the name of Lieber & Company, which alone had been determined to be an enemy, and the determination and demand did not determine that such stock was held for, on account of, or on behalf of, or for the benefit of, Lieber & Company. The determination and demand merely held that Lieber & Company had a wholly undefined interest therein.

It would be an extraordinary situation if a statute having the drastic effect which the Custodian claims in respect of the amendment to Section 7(c) should be extended to cover cases which do not measure up to its requirements, and even more extraordinary if it should be given a retroactive effect to cover cases which had been dealt with prior to the statute, not in contemplation of it, and naturally not measuring up to it, in the absence of any further war-time action after the statute in order to make it applicable. And since the war-time determinations and demands made subsequent to the statute were in precisely the same form as those which were made before action under the statute was contemplated, it is natural

that they too should fall short of laying a basis for the application of the statute.

The provisions of Section 12 are inconsistent with the implied meaning which the Custodian attributes to Section 7(c) as amended.

Section 12 of the Act was in effect throughout the war and has never been repealed. That section made it the duty of every corporation to transfer its shares upon its books into the name of the Custodian "upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests." (Act of Oct. 6, 1917, as amended by Act of March 28, 1918, Ch. 28, 40 Stat. 460; Fed. Stat. Anno. Supp. 1918, p. 863.)

There can be no denial that prior to November 4, 1918 the Trading with the Enemy Act expressly indicated in Section 12 that a corporation should transfer shares upon its books only upon the presentation of the outstanding certificates. The claim is that this situation was reversed by the amendment of November 4, 1918 to Section 7(c). Yet that amendment did not purport to repeal or alter the provision of Section 12 and left that provision unchanged.

It will be noted that the amendment of November 4, 1918 to Section 7(c) does not provide that such new certificates shall be issued without the surrender of the outstanding certificates. If the amendment be construed as requiring the issue of new certificates without the surrender of the old ones the express provision in Section 12 to the contrary would be stricken down by an unnecessary inference drawn from this amendment. It is submitted that this would be an unwarranted construction of the statute as a whole.

It is true that Circuit Courts of Appeals in two cases have held, where the facts indicated a symbolic seizure of the shares during the war, that the Act as thus amended requires that a corporation issue new certificates without

the surrender of the old ones, and similar decisions have been made by some of the District Courts.[1]

The principal reason given in these cases for such a construction of the statute is that the debates in Congress and the discussions in the Congressional Committees indicate that such construction was one of the purposes of the then Custodian in proposing the amendment. To give such effect to legislative debates and Committee discussions would go far beyond the limits of the applicable rule governing statutory construction, stated in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, as follows:

> "Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. *Duplex Printing Press Co.* v. *Derring*, 254 U. S. 443, 475. But when taking the act as a whole, the effect of the language used is clear to the Court, extraneous aid like this can not control the interpretation. *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 198. *Caminetti* v. *United States*, 242 U. S. 470, 490. Such aids are only admissible to solve doubt and not to create it" (p. 589).

Certainly it cannot be said that the language of Section 12 of the Act is doubtful or obscure, and there is nothing in Section 7(c) as amended which is necessarily in conflict with the express provision of Section 12.

Moreover, it is by no means clear that the Committees and Congress understood the effect of the amendment in

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[1] *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft* (C. C. A. 2), 283 Fed. 746; *Columbia Brewing Co.* v. *Miller* (C. C. A. 5), 281 Fed. 289; *Garvan* v. *Certain Shares of International Agricultural Corporation* (D. C.), 276 Fed. 206; *Garvan* v. *Marconi Wireless Telegraph Co.* (D. C.), 275 Fed. 486.

In *Hicks* v. *Baltimore & Ohio R. R. Co.*, 10 Fed. (2d) 606 (Dist. Ct. Dist. of Md. February 2, 1926), relief was accorded the Custodian upon war-time determinations and demands similar to those involved here. It is understood that an appeal is to be taken.

the sense now claimed by the Government. Senator Underwood in Committee appeared to be under the impression that Congress had already attempted to give the Custodian full power to dispose of enemy-owned shares of stock and that a provision to require the issue of new certificates without the surrender of the old ones would simply carry out the terms of the original Act,[1] and Mr. Sherley, in making a report on the bill for the Appropriation Committee of the House stated that he understood that the provision simply clarified and made plain the original Act.[2]

Neither the provisions of the amendment nor the debates and discussions carry any implication of any purpose to give the Custodian any greater power of transfer than was possessed by an enemy owner, or to take away from the corporation any protection which it has the right to exact from an owner of its shares.

We therefore earnestly insist that the lower courts which have so far dealt with this matter have been wrong in unnecessarily construing the statute so as to strike down the express and unmodified provision of Section 12 so as to deprive the corporation of essential and important rights and so as to give the Custodian greater rights than the owner of the stock would have.

The Custodian's action confirms view that statute does not apply.

The very fact that after the amendment of November 4, 1918 the Custodian continued to use as to shares here involved the same form of determination and demand which he had used as to the other shares here involved prior to that date, when he could not be regarded as having contemplated invoking any such statute, emphasizes that the matter is entirely outside the scope of the

[1]Hearings before sub-committee of Committee on Appropriations of the Senate, held October 18, 1918, pages 81 to 88.
[2]Congressional Record, Vol. 56, p. 12550.

statute. On the contrary in the *Kaliwerke* and *Columbia* cases *supra,* the Custodian, after the Act of November 4, 1918, used forms which at least indicated that he thought the statute applied, and he laid a basis for maintaining that position.

The fact that until 1924 he never attempted to get any of the Great Northern shares transferred except on surrender of the certificates is evidence of a contemporaneous practical construction on his part that the statute did not apply to these cases.

The "requests in the form of demands" which he made in 1924 further emphasized the former practical construction that these cases were not within the statute, because he then attempts to do by recital and demand, (two and one-half years after the end of the war in 1921) all the things which his war-time determinations and demands had failed to do. He recited in his 1924 requests or demands that he had determined that the shares belonged to the enemy and that he had demanded that they be transferred to him.

THE DUE EXECUTION OF THE WAR-TIME DETERMINATIONS AND DEMANDS IS DENIED.

The answers (Record, pp. 30, 33) put in issue the question of the due execution of the determinations and demands made prior to the termination of the war. The exhibits to the petition show on their face that the determinations and demands mentioned were not made by the Custodian in person, but that they purport to show that they were signed by the "Managing Director." There was no proof that these determinations and demands were in fact signed by the Managing Director. On the other hand, it is shown by stipulation that the seal of office of the Custodian was affixed to all of such determinations and demands.

If a corporation, without the surrender of the outstanding stock certificates, makes on its books a transfer of the shares thereby represented and issues new stock certificates therefor, the corporation takes the risk as to the authenticity and validity of the Custodian's proceedings upon which such an extraordinary step is based. For the protection of the corporation, therefore, it is necessary to raise question whether it can legally rely, in the taking of such exceptional steps, upon papers bearing the seal of the Custodian, when the papers themselves are not executed by the Custodian and are not proved to be executed by any one having authority from him for that purpose.

NO ACTION AFTER THE WAR COULD OR DID CREATE ANY RIGHT IN THE CUSTODIAN WITH RESPECT TO THESE SHARES.

The post-war action attempted by the Custodian created no right in him under the Act, and that Act would be unconstitutional if construed as authorizing the post-war creation of rights by such action.

The war ended on July 2, 1921, by virtue of the Joint Resolution of Congress of that date (42 Stat. 105).

More than two years and a half later the Custodian, deciding to try to compel Great Northern to transfer to him the legal title to the shares involved in this proceeding, signed additional documents (dated January 19, 1924, R. 24, 29, and February 25, 1924, R. 19), which undertook to recite, contrary to the legal effect of what had been done during the war, that he had determined that the shares in question were held by Great Northern for specified enemies and undertook to demand, what he had never demanded during the war, that Great Northern transfer the shares to him through cancelling the shares upon its books and issuing new certificates on behalf of the Custodian.

What the Custodian determined and demanded during the war must be established by the determinations he then made, and cannot be affected by post-war recitals designed to add to the effect of what he did during the war.

The Trading with the Enemy Act does not purport to give the Custodian the power to effect seizures of property after the war. Naturally this is so because the extraordinary authority conferred by that Act is derived from the war power. That Act, as originally enacted, and as amended in 1918, 1919 and 1920, "is strictly a war measure and finds its sanction in the constitutional provision, Art. 1, §8, Cl. 11." *Stochr* v. *Wallace,* 255 U. S. 239, 242.

The Act "may be denominated an exercise of governmental power in the emergency of war and its procedure is accommodated to and made adequate to its purpose." *Commercial Trust Co.* v. *Miller,* 262 U. S. 51.

In *Miller* v. *Rouse,* 276 Fed. 716, 717, the Court denied the Custodian's effort to obtain certain property because the Custodian's demand, although actually signed before the end of the war, was not served until after the end of the war. The Court therefore held that there was no effective capture.

In *Kohn* v. *Jacob & Josef Kohn*, 264 Fed. 253, the District Court held that before the Custodian could reduce his title to possession, he must complete his title by the symbolic act of capture. Clearly a capture could not be accomplished by symbolic acts of capture committed in time of peace.

In *In Re Miller*, 281 Fed. 765, 776, and also in *Application of Miller*, 288 Fed. 760, 767, the Circuit Court of Appeals for the Second Circuit, held that demands there in question could be enforced after the war *inasmuch as the demands had been made during the war.*

In *Sutherland* v. *Guaranty Trust Co. of New York*, 11 Fed. (2nd), 696, (C. C. A., Second Circuit; before HOUGH, MANTON and HAND, *JJ.*), it appeared that during the war the Custodian made a demand upon the Trust Company in respect of an account therein with the enemy, the amount of the account being stated at $6,710.17. After the end of the war it appeared that on account of errors the amount of the account had been understated in the

Trust Company's report to the Custodian and such amount was in fact $53,751.89. The Custodian then undertook to enlarge his demand accordingly. The court held that the Custodian's demand in its precise nature had been met by payment; that demand was essential before the Custodian could proceed under Section 17; that demand was necessary during the period of the war; that while the Custodian could make a further demand, this must be made prior to peace.

In the case at bar the Custodian did not make during the war any determination that these shares belonged to the enemy and did not demand during the war that such shares be transferred to him. Hence there was no effective seizure during the war and the absence of such war-time seizure cannot be supplied by recitals or demands made two and a half years after the war ended.

To give the Trading with the Enemy Act the effect of authorizing seizure after the end of the war through means of post-war determinations and demands would be unconstitutional because not within the scope of the war power of Congress (Constitution, Art. 1, Sec. 8, Cl. 11), upon which alone that Act can be sustained.

The very fact that the Custodian conceived it expedient to execute the additional documents in 1924 and to attempt to accomplish thereby the two essential steps which he had omitted to take during the war, i. e. a determination of the enemy ownership of the shares themselves and a demand for the transfer of those shares, strikingly emphasizes the insufficiency of his war-time action.

The Joint Resolution of Congress of July 2, 1921 should not be construed as giving the Custodian power to create additional rights in himself after the end of the war, and would be unconstitutional if so construed.

This Joint Resolution (42 Stat. 105) officially declaring at an end the war between the United States and Germany and between the United States and Austria, did not extend beyond the end of the war the war

powers of the Custodian to create rights in the Government or to overturn private rights which had not been lost by war-time action. Certainly no such extension of the Custodian's war powers would have been constitutional as to rights of citizens of this country (including the rights of a corporation of this country in respect of transfers of its shares of stock), or of citizens of any allied or neutral country. To construe the Joint Resolution as having any such effect would make it unconstitutional because setting up in times of peace methods of *ex parte*, secret, administrative procedure at variance with the peace-time requirements of due proces of law. It is doubtful whether, apart from treaty with an ex-enemy country, such methods, wanting in time of peace in due process of law, could be applied even to ex-enemies themselves.

The true purport of the Joint Resolution of July 2, 1921, is that where an effective seizure of property was made during the war, the United States may thereafter deal accordingly with such property. So construed, the Joint Resolution would give the Government no power to make after the end of the war an effective seizure which was not made during the war as to the shares here involved.

If there were doubt as to the construction of the Joint Resolution in this respect, it should be so construed as to avoid its unconstitutionality and to avoid even a serious doubt as to its constitutionality (*Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422).

The Treaties of Peace should not be construed as giving the Custodian power to create in himself after the end of the war the rights he asserts in this proceeding.

It is probably true that as to enemy nationals the Treaties of Peace with Austria and Germany of August 24 and August 25, 1921, respectively (Treaty of Vienna, 42 Stat. 1946; Treaty of Berlin, 42 Stat. 1939), vested in our Government certain rights to extraordinary forms of pro-

cedure which would not be constitutional as a matter of peace-time Congressional enactment. But the rights thus obtained to be exercised in time of peace against former enemies cannot sustain the relief which the Custodian here seeks, because that action affects not merely the interest of the former enemies in these shares but also affects all possible interests or rights of other than former enemies, including the rights of Great Northern in the transfer of its shares of stock. If such rights of Great Northern were not constitutionally taken away by war-time action of the Custodian, it is clear that such rights could not be taken away after the war by virtue of any authority arising from the Treaties of Peace.

This view necessarily results from the recognized doctrine that the rights accruing, under the Treaties, to the United States in respect of property of enemy nationals accrued to the United States as grantee of the enemy nations (*Direction der Disconto-Gesellschaft* v. *U. S. Steel Corp.*, 300 Fed. 741; affd. 267 U. S. 22). Of course Germany or Austria could not grant the United States any right to deal with any interests belonging to others than their respective nationals, and could not, for example, grant the United States any power to interfere with the rights of an American corporation in the due transfer of its shares.

It would beg the question to assume that nobody but the enemy had any interest in these shares. The Custodian never so determined during the war. All his determinations were consistent with the view that the principal, and perhaps the sole, beneficial interest was owned by others than enemies. In any event Great Northern had rights in the transfer of these shares and if these rights were not constitutionally taken away by effective seizure during the war, they could not be granted away by Germany or Austria under the Treaties of Peace.

CONCLUSION.

The decree herein should be reversed and the cause remanded to the District Court with directions to enter an order dismissing the petition.

Respectfully submitted,

M. L. COUNTRYMAN,
WALKER D. HINES,
Counsel for Appellants.

New York, July 30, 1926.

APPENDIX A.

A. P. C. Form No. 106-A

Report No. 9022. Trust No. 8221.

ALIEN PROPERTY CUSTODIAN

DEMAND ON CORPORATION FOR STOCKHOLDER'S INTEREST WITHOUT PRESENTATION OF CERTIFICATES

Demand by Alien Property Custodian for Property

EXTRACTS FROM "TRADING WITH THE ENEMY ACT"

Sec. 7 (c). "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Sec. 7(e). "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

"Any payment, conveyance, transfer, assignment or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up

any notes, bonds or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee."

EXTRACTS FROM EXECUTIVE ORDER OF FEBRUARY 26, 1918

Sec. 1(c). "The words 'right,' 'title,' 'interest,' 'estate,' 'power,' and 'authority' of the enemy, as used herein, shall be deemed to mean respectively such right, title, interest, estate, power, and authority of the enemy as may actually exist and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include respectively the right, title, interest, estate, power, and authority in law or equity or otherwise of any representative of or trustee for the enemy or other person claiming under or in the right of, or for the benefit of, the enemy."

Sec. 2(a). "A demand for the conveyance, transfer, assignment, delivery, and payment of money or other property, unless expressly qualified or limited, shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover."

Sec. 2(c). "When demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the

Enemy Act' and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

Sec. 3(d). "The Alien Property Custodian may exercise any right, power, or authority of the enemy in, to, and over corporate stock, shares, or certificates representing beneficial interests owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy, including (1) the right to receive all notices issued by the corporation, unincorporated association, company, or trustee which issued such stock, shares, or certificates, to the holders or owners of similar stock, shares, or certificates, (2) the right to exercise all voting power appertaining to such stock, shares, or certificates, and (3) the right to receive all subscription rights, dividends, and other distributions and payments, whether of capital or income, declared or made on account of such stock, shares, or certificates, regardless of whether or not such stock, shares, or certificates be in the possession of the Alien Property Custodian and regardless of whether or not such stock, shares, or certificates have been transferred to the Alien Property Custodian upon the books of the corporation, association, company, or trustee issuing the same."

APC-MM-188 Rev.

You are hereby instructed to remit all accumulated dividends direct to this office upon receipt hereof. If checks for accumulated dividends have heretofore been drawn in favor of the enemy and are now held by you, you may send such checks direct to this office.

All future dividends shall be remitted to Guaranty Trust Company of New York as depositary for Alien Property Custodian. Trust No. F-8221-X, as depositary in this trust.

You will also direct all notices hereby demanded, to said depositary and identify each notice by the trust number hereof.

To Great Northern Railway Company, address 32 Nassau Street, New York, New York:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act," approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act, and by said executive orders, after investigation do determine that Albertine, Baroness Schauenburg (name of enemy or ally of enemy), whose address is Friedburg, Baden, Germany (last known address), is an enemy (not holding a license granted by the President), and has a certain right, title, and interest in and to 12 shares of preferred (common, preferred) stock standing on your books in the name of Albertine, Baroness Schauenburg.

I, as Alien Property Custodian, do hereby require that you shall convey, transfer, assign and deliver to me as Alien Property Custodian, to be by me held, administered, and accounted for as provided by law, every right, title, and interest of the said enemy in said stock, including in respect to the said stock the right which the said enemy may have, (a) to receive all notices issued by you to the holders or owners of similar stock, shares, or certificates; (b) to exercise all voting power appertaining to such stock, shares, or certificates; (c) to receive all subscription rights, dividends, and other distributions and payments, whether of capital or of income, declared or made on account of such stock, shares, or certificates.

I, as Alien Property Custodian, do hereby further require that you note the substance of this demand upon your stock books and/or stock ledger, and that you furnish a copy of this demand to the registrar and/or transfer agent, if any, of the stock in respect to which this demand is made.

I, as Alien Property Custodian, do hereby further require that within ten days from the service of this demand upon you, you report to me any and all acts which you have done, or omitted to do, pursuant to the requirements of this demand.

Until otherwise directed, you will remit to the Alien Property Custodian at Washington, by check payable to

his order, all payments, whether of capital or income, now or hereafter declared or due on account of such stock, shares, or certificates, and you will direct such notices in respect to the said stock, shares, or certificates to the Alien Property Custodian.

This demand is supplementary to any demand which may hitherto have been made upon you, accompanied by the presentation of certificates which represent shares or beneficial interests, for the transfer into my name as Alien Property Custodian, of such certificates, or for the transfer thereof into the name of any nominee of me as Alien Property Custodian, and this demand shall not prejudice or affect any demand accompanied by such certificates which has been, or which may hereafter be, made.

Witness my hand and seal of office, this 24th day of April, 1918.

A. MITCHELL PALMER, Alien Property Custodian, by
(Sgd.) J. L. DAVIS, Managing Director.

APPENDIX B.

To: Great Northern Railway Company,
Address: 32 Nassau Street, New York City.

and to all transfer agents, registrars, and other persons having power to perform any of the acts hereinafter required.

Whereas, the Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act" approved October 6, 1917, and the amendments thereto, and the proclamations and Executive Orders issued in pursuance thereof, by virtue of the authority vested in him by said Act, said Proclamations and Executive Orders, after investigation, did determine that those certain shares of your capital stock heretofore registered and standing upon your books in the name of the person or persons listed in Column No. 1 of the schedule marked "Exhibit A" attached hereto and made a part hereof (said schedule being identified by the signature A. Henry Walter on the margin thereof), and evidenced or represented by a certificate or certificates numbered as specified in Column No. 2 of said schedule on the same line with the name of the person in whose name said stock is registered or stands, of the number and class of shares listed in Column No. 3 of said schedule on the same line as aforesaid, belonged to and were by you held for, on account of, on behalf of, or for the benefit of the person or persons listed on the same line therewith Column No. 4 of said schedule; and

Whereas the said Alien Property Custodian, did, after investigation, determine said persons whose names are listed in said Column No. 4, and whose addresses are given in Column No. 5 on the same line therewith, to be enemies not holding a license granted by the President, within the purview of said Act as amended and said proclama-

tions and Executive Orders issued in pursuance thereof; and

Whereas the said Alien Property Custodian, by virtue of the demand or demands heretofore served on you, did acquire every right, title and interest of the said persons whose names are listed in said Column No. 4 in the said shares of stock, including in respect to the stock, the right which the said persons may have (a) to receive all notices issued by you to the holders or owners of similar stock, shares or certificates, (b) to exercise all voting power appertaining to such stock, shares, or certificates, and (c) to receive all subscription rights, dividends, and other distributions and payments whether of capital or of income, declared or made on account of such stock, shares, or certificates;

Now, therefore, I, Thomas W. Miller, as such Alien Property Custodian, duly appointed, qualified, and acting as aforesaid, by virtue of the authority vested in me by said Act, proclamations and Executive Orders, and particularly by the amendment to Subsection (c) of Section Seven of said Act, approved November 4, 1918, do hereby require you to cancel forthwith upon your books and records, all the said shares of stock listed in said schedule and in lieu thereof to issue new certificates respectively in the name of the person or persons as specified in Column No. 6 of said schedule.

This requirement is supplementary to any which has been heretofore made upon you with respect to said shares or certificates and shall not prejudice nor affect any such requirement or any rights acquired by virtue thereof.

Witness my hand and seal of office, this 19th day of January, 1924.

(Sgd.) THOMAS W. MILLER,
Alien Property Custodian.

(Seal of Alien Property Custodian,
United States of America.)

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 345

GREAT NORTHERN RAILWAY COMPANY AND CENTRAL UNION TRUST COMPANY OF NEW YORK, appellants

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

PREVIOUS DECISION IN THIS CASE

The opinion of the District Court in this case is not reported. It will be found, however, at the foot of page 38 and top of page 39 of the Record.

GROUNDS FOR THE JURISDICTION OF THIS COURT

This case comes to this Court upon an appeal from a final decree of the District Court of the United States for the Southern District of New York (R. 39 to 41) entered March 11, 1925. The

proceeding in the District Court was instituted by Thomas W. Miller, as Alien Property Custodian, pursuant to the provisions of Section 17 of the Trading with the Enemy Act (c. 106, 40 Stat. 425) and Section 24 of the Judicial Code (c. 231, 36 Stat. 1091) to compel the appellant, the Great Northern Railway Company, to cancel upon its books and records certain certificates of stock and to issue in lieu thereof to him in compliance with certain demands new certificates therefor, and to compel the appellant, the Central Union Trust Company, the registrar of the Railway Company, to countersign said new certificates issued by the Railway Company. The final decree in the District Court granted the relief for which the Custodian prayed. The case is brought to this Court upon an appeal under Section 238 of the Judicial Code (c. 231, 36 Stat. 1157).

STATEMENT OF THE CASE

At various times between December 20, 1917, and May 1, 1919, the appellant, the Great Northern Railway Company (hereinafter referred to as the Railway Company) acting in compliance with the provisions of Section 7 (a) of the Trading with the Enemy Act (c. 106, 40 Stat. 416) filed with the Alien Property Custodian three separate reports. In two of these reports the Railway Company stated that certain named persons believed by it to be enemies, were severally the registered own-

ers of certain specified shares of its preferred capital stock of the par value of $100 a share. The number of shares of its preferred capital stock covered by these two reports and involved in this litigation was 532. (R. 3, 7.) The Railway Company filed a third report in which it reported that Lieber & Company believed to be an enemy, was believed by it to be the beneficial owner of 596 shares of its preferred capital stock of the par value of $100 per share represented by various certificates, and that said stock stood in the name of A. Biedermann & Company, the registered owner thereof. (R. 8.)

The Railway Company stated in its report that the location of the certificates for this stock was unknown to it.

Subsequent to the dates of the various reports the Alien Property Custodian, after investigation, determined that the various persons which the Railway Company had stated in its reports it believed to be enemies, were enemies and issued several demands which were served upon the Railway Company.

Seventeen of the Custodian's demands covering the entire 1,119 shares of the preferred capital stock of the Railway Company involved in this suit were issued and served upon the Company prior to July 2, 1921. All the demands served prior to July 2, 1921, are in the same form, and Exhibit A to the petition (R. 11 to 14) may be taken as an example. The demands are directed to the Railway Company

and in them the Custodian after investigation determines that a certain person is an enemy and has a certain right, title, and interest in and to the specified number of shares of stock standing on the books of the Company in the name of a particular person. In all cases the person determined to have a certain right, title, and interest to the particular stock is the registered owner except in the case of 596 shares of the 1,119 shares which were registered in the name of A. Biedermann & Company. To these the Custodian determined that Lieber & Company, reported by the Railway Company as believed to be the beneficial owner of the stock, had a certain right, title, and interest.

After making this determination, the Alien Property Custodian required the Railway Company to convey, transfer, assign, and deliver to him every right, title, and interest of the specified enemy in the said stock, including in respect to the said stock the right which the enemy had (*a*) to receive all notices issued by the Railway Company to the holders or owners of similar shares of stock or certificates; (*b*) to exercise all voting power appertaining to such stock, shares or certificates; and (*c*) to receive all subscription rights, dividends, and other distributions and payments, whether of capital or of income declared or made on account of such stock, shares or certificates. The Railway Company was further required (1) to note the substance of the demand upon its stock books or stock ledger; (2) furnish a copy of the demand to the

registrar or transfer agent of its stock; (3) report within ten days the acts it had done or omitted under the demands; and (4) remit to the Custodian all payments whether *capital* or income then or thereafter declared or due.

Demands covering 513 shares of the capital stock here involved were made pursuant to Section 7 (c) of the Trading with the Enemy Act as originally enacted (c. 106, 40 Stat. 418), while demands covering 606 of the shares here involved were made subsequent to the amendment of November 4, 1918 (c. 201, 40 Stat. 1020).

Subsequent to July 2, 1921, the date of the end of the war, and during the year 1924, the Alien Property Custodian issued and served upon the Railway Company what he termed "requests in the form of demands," relating to the entire 1,119 shares of the preferred capital stock of the Railway Company involved in this suit. These various documents are in the same form. Exhibit C to the petition (R. 18, 19) may be taken as an example. After reciting the determination and requirements of the Alien Property Custodian under the various demands issued prior to July 2, 1921, the Custodian required the Railway Company "to cancel forthwith upon your books and records all said shares of stock * * * and in lieu thereof to issue new certificates respectively, in the name of the person or persons as specified, etc." It is recited that the requirement in the document which

is denominated by the Custodian " a request in the form of a demand " is supplementary to any which had theretofore been made upon the Railway Company with respect to the said shares or certificates.

The Railway Company has at all times paid to the Alien Property Custodian the dividends upon the shares of stock here involved (R. 5, 7, 9), but has refused to issue certificates for the stock in the name of the Alien Property Custodian because the location of the old certificates is not known and the Custodian has not presented the old certificates to the Railway Company for cancellation.

The Custodian instituted the present proceedings in the District Court by petition, wherein he set forth the facts substantially as stated *supra,* and asked that a rule to show cause be issue directed to the Railway Company and its registrar, the Central Union Trust Company of New York, requiring the Railway Company to show cause why it should not cancel the outstanding certificates, and issue new certificates to him, and why the registrar should not be required to countersign the new certificates when issued. (R. 11.) The rule to show cause was issued. (R. 1 and 2.) Thereafter the Railway Company and the Trust Company filed their answers (R. 30 to 33) in which they admitted substantially all the material facts but set up as a defense certain provisions of the Minnesota law under which it was organized, and certain provisions of its by-laws which they contended prevented it from issuing certificates for its stock

without securing the outstanding certificate for cancellation. They further contended in their answer that if any law of the United States required the corporation to issue certificates in any other way the same would be in violation of the Constitution of the United States.

After hearing upon the petition and answers the District Court directed the Railway Company to issue the certificates to the Custodian and the Trust Company to countersign the same.

SUMMARY OF ARGUMENT

The demands of the Alien Property Custodian served pursuant to determination made under the Trading with the Enemy Act, after investigation, created an absolute duty of compliance upon the person served therewith. Persons injured by the demands must seek relief under Section 9 of the Act (c. 285, 42 Stat. 1511) after the demands have been complied with. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stochr* v. *Wallace*, 255 U. S. 239.

In these cases the Alien Property Custodian required the transfer to him of all right, title and interest in the stock of the enemy whom he had determined to be the owner of the stock, together with the right of the enemy to receive all notices issued by the corporation to holders or owners of similar stock, to exercise all voting power appertaining to such stock, and to receive all subscription rights, dividends and other distributions and payments

whether of capital or income declared or made on account of such stock. The Custodian further required that all the dividends on this stock be paid to him and that all payments, whether capital or income, be paid to him. Had the corporation at this moment been liquidated the distributive share of the capital represented by that specific stock would have had to be paid to the Custodian under the demands. This operated as a substantial seizure of the specific shares of stock.

The enemies determined to be the owners were, as to 523 shares, the persons in whose name the stock was registered. As to the other 596 shares the persons determined to have a right, title, and interest in the stock were the persons whom the Railway Company had reported to the Custodian it believed to be the beneficial owners of the stock.

The amendment to Section 7 (e) of the Act of November 4, 1918 (c. 201, 40 Stat. 1020) placed upon the corporation a duty to issue to the Custodian certificates for all stock demanded without the necessity of a demand by the Custodian for such certificates, for Section 7 (e) as thus amended mandatorily requires corporations to cancel upon their books all shares of stock standing in the name of the person who shall have been determined to be an enemy and which shall have been required to be conveyed and delivered to the Custodian or which has been seized by him, and in lieu of such certificates the corporation is required by the statute to issue to the Custodian new certificates.

The demands of the Custodian, as shown, constituted a seizure of those specific shares. Hence the enactment of the Act of November 4, 1918 (c. 201, 40 Stat. 1020) called the duty to issue the certificates therefor to the Custodian into being. The statute operated upon facts in being. This does not make the statute retroactive. It simply draws upon antecedent facts for its operation. *Cox* v. *Hart,* 260 U. S. 427 to 435. The demands made subsequent to November 4, 1918, and prior to July 2, 1921, *a fortiori* place upon the Railway Company a duty to issue the certificates.

The Act is constitutional even though it does not require the presentation of the outstanding certificates since *bona fide* nonenemy holders of those certificates are protected by the provisions of Section 9. *Miller* v. *United States,* 11 Wall. 268; *Central Union Trust Company,* v. *Garvan, supra; Stoehr* v. *Wallace, supra; Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft,* 283 Fed. 746; *Columbia Brewing Company* v. *Miller,* 281 Fed. 289; *Garvan* v. *Marconi Wireless Telegraph Co.,* 275 Fed. 486.

The corporation is fully protected in issuing new certificates without the surrender of the old by Section 7 (e) of the Trading with the Enemy Act (c. 106, 40 Stat. 418). *The Commercial Trust Co.* v. *Miller,* 262 U. S. 51; *Kahn* v. *Garvan,* 263 Fed. 909; *Garvan* v. *Marconi Wireless Co. of America, supra.* See also *Ford* v. *Surget,* 97 U. S. 594; *Lamar* v. *Browne et al.,* 92 U. S. 187.

ARGUMENT

THE DEMANDS OF THE ALIEN PROPERTY CUSTODIAN CREATED A DUTY UPON THE RAILWAY COMPANY TO TRANSFER THE STOCK TO THE CUSTODIAN LEAVING ALL CLAIMS TO OR AGAINST THE STOCK TO BE SETTLED IN A PROCEEDING UNDER SECTION 9 OF THE TRADING WITH THE ENEMY ACT

This principle has been so often and so emphatically enunciated by the courts that it requires no elucidation. Numerous decisions have discussed the general proposition. The first case decided by this Court upon the subject and which is the leading case is *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554. In discussing the demands of the Custodian in that case this Court said (p. 567):

> If we look no further than Sec. 7 (c), it is plain that obedience to the statute requires an immediate transfer in any case within its terms without awaiting a resort to the Courts. The occasion of the duty is a demand after a determination by the President and it is hard to give much meaning to the words " which the President after investigation shall determine is so * * * held " unless the determination and demand call the duty into being. The condition " after investigation " additionally points to the intent to make his act decisive upon the point, as it is in other cases mentioned in Sec. 7 (a).

See *Stoehr* v. *Wallace,* 255 U. S. 239; *Commercial Trust Co. of New Jersey* v. *Miller,* 262 U. S. 51; *American Exchange National Bank* v. *Simon,* 260 U. S. 706.

II

THE DEMANDS OF THE CUSTODIAN IN THIS CASE OPERATED AS A SEIZURE OF THE STOCK AND GAVE THE CUSTODIAN A RIGHT TO HAVE CERTIFICATES FOR THE STOCK COVERED BY THE DEMANDS ISSUED TO HIM

The demands of the Custodian which were made prior to July 2, 1921, the date of the declaration of peace between the United States and Germany, although precisely the same in terms with the exception of the shares of stock covered, fall into two classes; those issued before the amendment to Sec. 7 (c) of the Trading with the Enemy Act of November 4, 1918, and those issued thereafter. Those issued before the amendment covered 513 shares of the capital stock here involved, and those issued after the amendment covered 606 shares.

Sec. 7 (c) of the Act as originally enacted (c. 106, 40 Stat. 418) provides:

> If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian.

Section 7 (c) as amended November 4, 1918 (c. 201, 40 Stat. 1020), provides, in so far as material here:

If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the

> benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

All of the demands for the entire 1,119 shares of the stock made prior to July 2, 1921, are the same in form and content, with the exception of the number of shares of stock covered and the name of the enemy, as Exhibit A of the petition. (R. 11–14.) In these the Custodian, after investigation, determines that a specific person is an enemy and has a certain right, title, and interest in certain specific shares of stock of the Railway Company. This determination having been made, the Custodian requires the Railway Company to convey, transfer, assign, and deliver to him every right, title, and interest of the said enemy in the specific stock, including in respect to the stock the right which the enemy may have (1) to receive all notices issued by the Company to the holders or owners of similar stock, (2) to exercise all voting power pertaining to such stock, and (3) to receive all subscription rights, dividends, and other distributions and payments whether *capital* or income

declared or made on account of such stock. This is one portion of the demand.

The second portion of the demand requires the Railway Company to note the substance of the demand upon its books and/or stock ledger, and furnish a copy of the demand to its registrar.

The third portion of the demand requires the Custodian within ten days from the service of the demand to report to the Custodian any and all acts done and omitted pursuant to the demands.

The fourth portion of the demand directs the corporation to remit to the Custodian by check payable to his order all payments, whether capital or income, then or thereafter declared or due on account of such stock, shares, or certificates.

It will be noted from the third and fourth portions of the demand that the Custodian seized every right that goes with the ownership of stock with the exception of the right to have certificates issued.

It is admitted that under these demands the Railway Company paid to the Custodian the dividends declared on the specific stock. (R. 5, 7, 9.)

It becomes pertinent at this point to inquire what rights a stockholder in a corporation has. It has been stated by the Court of Appeals of New York "that a share of corporate stock is the right which the shareholder has to participate according to the number of shares in the surplus profits of the corporation on a division, and in the assets or capital stock remaining after payment of its debts on its

dissolution or the termination of its active existence and operation." *United States Radiator Co.* v. *State of New York*, 208 N. Y. 144, 149. There can be no doubt that the Custodian has acquired this right to participate, both in the surplus profits and in any distribution of assets. If the Great Northern Railway Company should be dissolved to-morrow, the Custodian would be entitled to receive such share of its assets as is represented by the shares of stock covered by his demands. This Court on this point has aptly said, in the case of *Gibbons* v. *Mahon*, 136 U. S. 549, at page 557:

> The distinction between the title of a corporation, and the interest of its members or stockholders, in the property of the corporation, is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock. The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation, during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts.

The above case was cited and approved in *Lynch* v. *Hornby*, 247 U. S. 339, 341. The Custodian is clearly entitled to all dividends by right of seizure and this, together with the other rights acquired, including voting power, necessarily carries with it title to the shares.

By virtue of the President's Executive Order of July 16, 1918, the Custodian also has the power to sell these shares. He can not exercise this power, however, without the certificates. To a possible purchaser, the certificates alone denote ownership. It would be the same if one possessed grain in a warehouse. It could not be sold without the warehouse receipt. Like a warehouse receipt, a certificate of stock is mere evidence of title.

There are many authorities on this subject. "The certificate is only one of the *indicia* of title." *Dewing* v. *Perdicaries*, 96 U. S. 193, 196. "The certificates are only evidence of the ownership of the shares." *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1, 13. "Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it." *Eisner* v. *Macomber*, 252 U. S. 189, 208. "The certificate of the corporation for the shares, or the stock certificate, is not necessary to the existence of the shares or their ownership. It is merely the written evidence of these facts." *United States Radiator Company* v. *State of New York*, 208 N. Y. 144, 149. Nothing can be gained by multiplying citations on this point.

If the Railway Company, after declaration of dividends, should refuse to pay any part thereof on the shares in question on the ground that the rightful owners of such shares are unknown, the Court, upon application, would issue a summary order compelling payment to the Custodian. *Ap-*

plication of Miller, 288 Fed. 760, 767, C. C. A. 2nd Circuit.

There are certain cases, among which *Miller* v. *Rouse,* 276 Fed. 715, is one, in which the Courts have held that under certain forms of demand the Custodian is not entitled to a summary order until there has first been a decision of a court of competent jurisdiction as to just what the enemy interest consists of. These cases all involved demands for the right of an enemy as a beneficiary under a will or under a trust. In such cases the courts have held that the Custodian is substituted in the place of the beneficiary, and it must first be determined by the court having jurisdiction of the estate or of the trust just what interest the enemy has before the Custodian becomes entitled to that interest. In such a case, as Judge Learned Hand said, "There is no specified fund or obligation on which the capture can operate." *Miller* v. *Rouse,* 276 Fed. 715, 716. Another case of this type is *Kahn* v. *Garvan,* 263 Fed. 909.

It is perfectly obvious that the demands in the case at bar are of an entirely different character. Here there is a definite something upon which the capture can operate—to wit, the shares of stock—and the Custodian is substituted for the enemy as the record owner of said shares. There is a further distinction due to the fact that here the Custodian has specifically demanded all dividends, and his right of ownership has been recognized by payment

of the dividends to him and by the transfer of new certificates to him in every instance where he obtained possession of the old certificates, although such old certificates would not have to be in his name or indorsed to him or even indorsed in blank.

In the *Rouse case* the effect of the demand was simply to substitute the Custodian in the place of the enemy as a beneficiary under a will. In such a case it is evident that the estate would first have to be administered before it could be determined what the rights of the beneficiaries were. There was nothing upon which the demand could take hold until there had first been a determination by the Surrogate's Court. The entire estate might have been consumed in the payment of debts. That situation can not be compared with this one. Suppose there should be a decision here that the interest of the enemies must first be determined by some court before the Custodian is entitled to have new certificates issued, what would be the result? What kind of a proceeding could be started? No one except the enemies themselves has ever claimed ownership of the stock or any interest therein. Every fact that could be brought before a court in such a suit is before the court here. The only evidence that could be produced would be the records of the corporation and the fact that no one other than the record owners had ever claimed any interest in the stock. Such facts are now before this Court and are undisputed.

In this case the enemy whose right, title, and interest in the stock the Custodian demanded is the record owner of the stock with the exception of the 596 shares which were registered in the name of A. Biedermann & Company. The Railway Company reported to the Custodian, however, that it believed that the beneficial owner of these 596 shares was Lieber & Company whom the Custodian determined to have a certain right, title, and interest in the stock. As between the Custodian and the Railway Company the Railway Company can not assert that anyone else has any beneficial right in the stock other than the enemy. Had the Custodian, prior to July 2, 1921, the date of the declaration of peace, required the Railway Company to issue certificates for the stock to him, there can not be much doubt but that the Courts would have enforced the Custodian's demands for the issuance of such certificates, especially in view of the amendment of November 4, 1918.

This Court considered very much the same question during the Civil War in a case arising under the Act of July 17, 1862, entitled " An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and other purposes " (12 Stat. 589). This Act provided in Section 5 thereof:

> That, to ensure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property,

> money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States.

The section then proceeds to enumerate those persons whose property as defined in Section 5 is subject to confiscation. It became necessary for this Court to pass upon the question of the seizure of corporate stock under this section in the case of *Miller* v. *United States* (1870) 78 U. S. (11 Wall.) 268. In view of the great bearing which this case has upon the present controversy, it will be considered with more than usual detail.

The facts of the case are comparatively simple. Miller was a person who had given such aid and assistance to the rebel government as to bring him within the general class of persons whose property was subject to confiscation under the Act of July 17, 1862. Although residing within Confederate territory, he was the registered owner of a large amount of the capital stock of two Northern corporations.

In order to carry out the provisions of the Act of July 17, 1862, the President charged the Attorney General with the superintendence and direction of all proceedings under it, and authorized and directed him to give the various district attorneys and marshals such instructions as might be necessary to that end, especially touching all seizure proceedings and condemnations under the Act.

Pursuant to these instructions the Attorney General instructed the district attorneys and marshals that all seizures would be made by the marshal of the proper district, under written authority given him by the district attorney, specifying with reasonable certainty the property to be seized and the owner whose right it was sought to confiscate. It was also provided that the marshal should make a return of the property seized to the district attorney. It was further provided that where the law of the State in which the seizure was made directs the method of seizure, it should be conformed to as nearly as might be consistent with the objects of the acts of Congress. It was provided that if the property seized were stocks or intangible property, the marshal ought (if there be no specific method provided by the State law) to describe the property as plainly as he could in his return and leave the court to determine the sufficiency of the seizure.

The corporations in which Miller owned stock were Michigan corporations, and under the law of Michigan there was no provision authorizing the taking of stocks on mesne process. The district attorney for the Eastern District of Michigan, acting under the general provisions of the instructions from the Attorney General, directed the marshal for that district to seize the shares of stock owned by Miller, and further ordered the marshal to leave a copy of the said seizure, certified by him, with the

clerk, treasurer, or cashier of the companies, or with such person as at the time had custody of the books and the papers of the corporation. Thereafter the marshal made a return to the district attorney that he had seized the shares of stock. The return concluded with the following words:

> I do further return that I seized said stock by serving a notice of said seizure personally upon M. L. Sykes, Jr., Vice President of the Michigan Southern & Northern Indiana Railway Company, and President of the Detroit, Monroe & Toledo Railroad Company.

After this seizure the district attorney filed a libel of information in the United States District Court for the Eastern District of Michigan against the property. Among other things, it was stated in the libel that the marshal *seized* the property. Upon this libel process of the court was issued, directed to the marshal, commanding him to hold the said stock, the same having been duly seized, until further order of the Court touching the same. Thereafter the marshal returned the process with this endorsement:

> I hereby certify and return that I have seized and now hold all the property described in the within writ, and now hold the same subject to the future order of the said court, and have given notice to all persons interested therein by publication, as required in the within writ.

There was no personal service upon Miller nor upon anyone professing to represent him. After the default of all persons had been entered and after reading the proof, which had been taken on the part of the United States, a decree was entered condemning and forfeiting the property of the United States. *By the decree a sale was ordered, and the two corporations were directed to cancel the old certificates of stock and issue new certificates to the purchasers at such sale.* It is to be noted specifically, in this connection, that the marshal in making the seizure in the Miller case did not seize the certificates of stock, and that the Court ordered the sale of the stock and the issuance of new certificates without the presentation of the old.

While there is no specific statement in the opinion of the Court or in the facts that the old certificates were outstanding, it does appear in the argument of counsel on page 282, that the old certificates were outstanding. A careful reading of the opinion of the Court can lead to no other conclusion than that the Court was construing the case as one where the certificates of stock were not seized by the marshal nor in the possession of any person concerned in the proceedings. We have, therefore, a statute authorizing the seizure of stocks of enemies with no provision as to the method of seizure, and there being no provision of the state law in which the corporation is situated, authorizing the seizure of stocks, and we have certificates for the stock outstanding in the hands of unknown persons.

Without quoting from the case at length the Court is respectfully referred for a discussion of the subject to pages 296 to 298 of the opinion. The Court held that the seizure was good and that the sale was proper. This decision was followed and approved in *Alexandria* v. *Fairfax,* 95 U. S. 774. See also *Pelham* v. *Rose,* 9 Wall. 196; *Brown* v. *Kennedy,* 82 U. S. 591; *Phoenix Bank* v. *Risley,* 111 U. S. 125.

The decision in *Miller* v. *United States* was followed by the Circuit Court of Appeals in *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft,* 283 Fed. 746, where the Court interpreted *Miller* v. *United States, supra,* as standing for the proposition that the Government could require the issuance of new certificates for seized stock without the necessity of the surrender of the old. The right to secure the issuance of these certificates was also decided in favor of the Government in *Columbia Brewing Co.* v. *Miller,* 281 Fed. 289, decided by the Circuit Court of Appeals for the Fifth Circuit, and in *Garvan* v. *Marconi Wireless Telegraph Co.,* 275 Fed. 486, decided by the District Court of the United States for the District of New Jersey.

But it is urged in the present case that the Custodian did not make any demands for certificates until after the declaration of peace on July 2, 1921, and that the demands made after that date are ineffective to give the Custodian any rights. The demands made after July 2, 1921, are termed by the

Custodian "requests in the form of demands." These demands are Exhibits C (R. 18), E (R. 23), and G. (R. 28) to the petition. These documents are simply a demand on the part of the Custodian that rights acquired prior to July 2, 1921, by him be respected, and that certificates to which he was entitled without the demands for specific certificates be issued to him.

Although Section 7 (c) as originally enacted *supra*, did not provide specifically for the issuance of certificates, Section 7 (c) as amended did so provide. Section 7 (c) as amended does not provide for the issuance of certificates for stock upon the demand of the Custodian, but lays upon corporations the duty to cancel upon their books all shares of stock standing in the name of persons determined by the Custodian, after investigation, to be enemies and which stock shall have been required to be transferred and delivered to the Custodian. At the time of the amendment on November 4, 1918, the facts upon which it acted were in existence in so far as 513 shares of the stock were concerned—namely, the stock stood in the name of persons whom the Custodian had determined to be enemies and the stock had been seized by the Custodian as demonstrated above; hence the duty immediately arose upon the corporation for it to issue certificates upon the Custodian for that stock.

This does not make the statute retroactive in any sense of the word. The rule is well known that no

statute will be construed to be retroactive unless it plainly so states. However, there are certain exceptions to this rule. In certain cases the courts have held that it is not necessary to construe a statute to be retroactive in order to apply it to pre-existing facts. The leading case on this subject is *Cox* v. *Hart,* 260 U. S. 427, 435, where the Court said: "A statute is not made retroactive merely because it draws upon antecedent facts for its operation." This Court cited the case of *Regina* v. *St. Mary,* 12 Q. B. Rep. 120, 127, where the Court held that a statute prohibiting the removal of destitute widows from a parish applied equally to widows whose husbands had theretofore died, as well as to those who might become widows thereafter. The Court there said that a statute "is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing." See also *Hollenbach* v. *Born,* 238 N. Y. 34, *People ex rel Eckerson* v. *Board of Education,* 126 App. Div. 414.

As to the demands made subsequent to November 4, 1918, and prior to July 2, 1921, it follows *a fortiori* that the duty to issue certificates came into being immediately upon the seizure by the Custodian of the stock on the books of the Company. The Custodian's "requests in the form of demands" made subsequent to July 2, 1921, were not necessarily for establishing rights in the Custodian, but constituted notice to the corporation that it

had not complied with the requirements of the statute operating upon facts which came into existence prior to the declaration of peace.

The intention of Congress and the purpose of the amendment to Section 7 (c) of November 4, 1918, is graphically shown by the Committee Reports and the hearings.

The Trading with the Enemy Act in its original form did not provide for the sale of enemy property, except to prevent waste. This provision was contained in Section 12 (c. 106, 40 Stat. 423). On March 28, 1918, Section 12 was amended (c. 28, 40 Stat. 460) giving the Custodian full power of sale under the direction of the President subject to certain provisos. The President by Executive Order of July 16, 1918, authorized the Custodian to sell shares of stock without regard to whether he had possession of the certificates. It was discovered, however, that as a practical matter stock could not be sold unless the certificates were in hand, and this situation was brought to the attention of Congress in October, 1918, and the provision now contained in the amendment of November 4, 1918, was introduced by Senator Underwood as an amendment to the First Deficiency Appropriation Bill for 1919. At a hearing before the subcommittee of the Committee on Appropriations of the Senate held October 18, 1918, Lee C. Bradley, Esq., of the Custodian's office, stated the reasons why the Government desired the amendment passed. In the report of the hearing the discussion with Sena-

tor Underwood and other members of the Committee is fully set out. In relation to the amendment as a whole, Mr. Bradley stated to the Committee:

> This amendment is designed to make effective the power of sale of enemy property. The original act conferred upon the Alien Property Custodian the power of sale only to prevent waste, and of course was therefore very limited. It will be found in section 12 of the Act, on page 15, of the printed copy I have handed you.
>
> In the urgent deficiency bill approved March 28—the last page of the printed copy contains it—Congress conferred the unrestricted power of sale on the Alien Property Custodian, striking out all limitations about cases only of waste and the like.

In relation to that part of the amendment dealing with shares of stock, Mr. Bradley said:

> Now, you will readily see that when we come to sell corporate stock where we have no evidence whatsoever of our title, notwithstanding that the certificate is mere evidence of the thing and not the thing itself, yet it is affected with certain elements of quasi-negotiability; and no prudent purchaser will buy unless we have something we can really offer to sell to him and make a delivery.

Senator Underwood, in discussing the matter, carefully set forth the purpose of the amendment:

Senator UNDERWOOD. Mr. Bradley, let me ask you this question: The purpose of this amendment covers two general subject matters and only two. One is handling the patent situation so that you can convey the title to the purchaser?

Mr. BRADLEY. Exactly.

Senator UNDERWOOD. The other is largely a question of transfer of stock certificates.

Mr. BRADLEY. Exactly.

Senator UNDERWOOD. And although Congress gave you, or attempted to give you, full power to dispose of enemy owned property, when you come to investigate and handle the situation you find that the power does not reach far enough to control the patent situation or the transfer of stock certificates that are not in the actual possession of the Alien Property Custodian.

Mr. BRADLEY. That is correct.

Senator UNDERWOOD. And all you want to do by this amendment is simply to carry out the terms of the original act, and give you the power that is necessary to handle these two particular features that are not covered by the general propositions?

Mr. BRADLEY. That is a very comprehensive statement of the whole purpose and scope of the amendments.

In reporting the amendment to the Senate, Senator Underwood stated that its purpose was to allow the Custodian to sell shares of stock where the certificates were in the possession of the enemies. The certificates were in the possession of

enemy holders and could not be obtained. (See Congressional Record for October 24, 1918, vol. 56, pt. 11, p. 11431.)

A conference was then held by members of the House and the Senate on the bill, particularly with reference to the amendments which had been added in the Senate. Mr. Sherley, Chairman of the Appropriation Committee of the House, in reporting to the House on the conference, stated in part as follows. (See Congressional Record for October 26, 1918, vol. 56, pt. 11, pp. 11481, 11482.)

> In some cases the Alien Property Custodian would obtain possession of shares of stock belonging to an alien enemy, because such shares were here in America and under the Act were delivered to him. In other instances the books of the corporation would show such stock ownership by an alien enemy, but the actual shares of stock were in the possession of such alien enemy and not within the United States. This amendment enables the Alien Property Custodian to get the evidences of title. He already, under existing law, gets the title to such property, but he would get the evidence of such title by the issuance of new certificates of stock by the corporation in lieu of those held by the alien enemy. * * *
>
> The House concurred in these amendments, believing that they were simply carrying out the plain intent and spirit of the Trading with the Enemy Act, and that it does not

change in any true sense the purpose and intent of such law, but clarifies and makes it plain.

It is quite apparent, therefore, what the real purpose of Congress was. From the foregoing it must follow that the Alien Property Custodian is entitled to the issuance of these certificates. The corporation cannot be injured nor can third persons be injured because if the outstanding certificates are in the possession of *bona fide* nonenemy holders who acquired the same prior to the war, they are amply protected by the provisions of Section 9 of the Act. They can institute suit against the Custodian and secure the return to them of the new certificate issued to the Custodian, and with the old certificates and a new one in their possession can procure the issuance of a third certificate covering all their rights.

III

THE CORPORATION IS NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW, BY BEING REQUIRED TO ISSUE THE NEW CERTIFICATES WITHOUT THE SURRENDER OF THE OLD.

It has been held by this Court that the summary provisions of the Trading with the Enemy Act concerning seizures by the Custodian are constitutional in view of the provisions of Section 9 for relief of persons whose property is mistakenly seized. *Stoehr* v. *Wallace*, 255 U. S. 239.

The corporation can not be injured in any way. Section 7 (e) of the Trading with the Enemy Act (c. 106, 40 Stat. 418) provides:

> No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.
>
> Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same.

There can be no demands made upon the corporation by reason of its issuance of new certificates. It is fully protected. *Commercial Trust Co.* v. *Miller,* 262 U. S. 51; *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft,* 283 Fed. 746.

Compliance with requirements of law has always been a defense to the person complying. *Ford* v. *Surget,* 97 U. S. 594; *Lamar* v. *Browne,* 92 U. S. 187. Third persons are fully protected, as stated above, by the provisions of Section 9 (a). This Court has repeatedly held that the provisions of that section offer ample remedy for any person aggrieved by the action of the Custodian under the Trading with the Enemy Act. *Central Union Trust Co.* v. *Garvan,* 264 U. S. 554, *Stoehr* v. *Wallace,* 255 U. S. 239.

The only other point that need be mentioned is that which the appellant, the Central Union Trust Company of New York, raises as a defense to being compelled to countersign the certificates ordered by the District Court to be issued to the Custodian—namely, that there was and still is an agreement in force and effect between it and the New York Stock Exchange are superseded in their of stock of the appellant Railway Company are listed, under which agreement the Trust Company has agreed and still agrees as a condition of being accepted by the New York Stock Exchange as such registrar not to register the transfer of stock certificates of the Railway Company without the surrender of the certificates outstanding therefor. Any arrangement in this respect or any rules of the New York Stock Exchange are superseded in their entirety by the legislation of Congress enacted pursuant to its war power. Arrangements of this sort cannot be permitted to interfere with the valid actions of the Government in the prosecution of the war. The State statutes and the rules of the New York Stock Exchange are subordinate to the war power exercised by Congress. *Northern Pacific Railway Co.* v. *North Dakota*, 250 U. S. 135; *Omnia Co.* v. *United States*, 261 U. S. 502.

CONCLUSION

It therefore follows that—

(1) The Alien Property Custodian validly seized the stock of the appellant Railway Company involved in this suit.

(2) The Act of November 4, 1918, placed a duty upon the Railway Company to issue to the Custodian certificates for this stock.

(3) The decree of the District Court is correct and should be affirmed.

Respectfully submitted.

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Attorneys for Appellee.

MAY, 1926.

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No. 53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

GREAT NORTHERN RAILWAY COMPANY AND CENTRAL UNION TRUST COMPANY OF NEW YORK, *Appellants*,

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF HAROLD W. BISSELL, 120 BROADWAY, NEW YORK CITY, ON BEHALF OF THE DEUTSCHE BANK AS AMICUS CURIAE.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In The

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October Term, 1926

No. 53

Great Northern Railway Company and Central Union Trust Company of New York, *Appellants*,

vs.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF HAROLD W. BISSELL, 120 BROADWAY, NEW YORK CITY, ON BEHALF OF THE DEUTSCHE BANK AS AMICUS CURIAE

Statement Regarding the Interest of the Amicus Curiae in the Present Case

The Deutsche Bank is concerned in the present case, because the principles which are determinative of this case will no doubt be regarded as decisive of the similar case of the *Baltimore and Ohio Railroad Company and Bankers Trust Company of New York* vs. *Howard Sutherland as Alien Property Custodian*, now pending in the United States Circuit Court of Appeals,

Fourth Circuit. *The Baltimore and Ohio Railroad Company* case was argued before that Court in June, 1926, but no decision has yet been rendered. The Deutsche Bank is concerned in the *Baltimore and Ohio Railroad Company* case for reasons of a disinterested nature which will be stated hereinafter.

STATEMENT OF THE PARALLEL BETWEEN THE PRESENT CASE AND THE BALTIMORE AND OHIO RAILROAD COMPANY CASE.

The present proceeding is one of a group of like proceedings instituted by the Alien Property Custodian against various railroad companies in the United States to compel them to cancel upon their books and records certain certificates of stock and to issue to him in lieu thereof new certificates for such stock. This relief was sought on the strength of certain "demands," served upon the railroad companies under the Trading with the Enemy Act. In these demands the Alien Property Custodian purported to determine respectively that certain specified persons or corporations were enemies and that they had interests in specified shares of stock of the railroad companies, whereupon the "demands" purported to seize those interests by requiring that they be conveyed to the Alien Property Custodian by the railroad companies.

The *Baltimore and Ohio Railroad Company* case is one of this group of like proceedings. In principle, the present case and the *Baltimore and Ohio Railroad Company* case raise identical questions. The language of the basic "demands" of the Custodian in the two proceedings is identical, aside from the specific names involved. In each case, the shares of stock involved were for the most part registered in the respec-

tive names of the persons determined by the Custodian to be enemies and to have some interest in the stock. In the *Baltimore and Ohio Railroad Company* case, one of the "demands" determined the Deutsche Bank to be an enemy having some interest in 74,126 shares of the common stock of the Railroad Company, registered in the Deutsche Bank's name, and purported to seize the Deutsche Bank's interest therein.

From a procedural standpoint also, the present case and the Baltimore and Ohio Railroad Company case are alike. Each case was decided by the District Court upon the pleadings. The *Baltimore and Ohio Railroad Company* case was carried to the Circuit Court on error; the present case is brought direct to this Court on appeal.

Scope of the Present Brief

The parties to the present case have consented to the submission of a brief on behalf of the Deutsche Bank as *amicus curiae* on the understanding that the brief should be the same in substance as a brief submitted similarly in the *Baltimore and Ohio Railroad Company* case. In compliance with this understanding, and in view of the like nature of the cases, it has been deemed appropriate to submit in the present case the identical argument submitted to the Circuit Court in the *Baltimore and Ohio Railroad Company* case.

While the facts in the two cases differ in detail, it is believed that they do not differ in principle. Furthermore, in so far as the facts bearing on the stock registered in the name of the Deutsche Bank are alleged in more detail in the *Baltimore and Ohio Railroad Company* case than are the corresponding facts in the

present case, the Court will of course treat such additional specific facts *arguendo* as merely illustrative of what might, upon a trial be proved to be the situation with respect to the stock involved in the present case. If the Court should, however, perceive any distinction in principle between the two cases, it is hoped that this brief may be of some assistance to the Court in fixing the limits of its decision in the present case.

While certain constitutional questions are considered in this brief, it is mainly devoted to other questions, and no attempt is made to duplicate the detailed treatment of constitutional questions contained in the brief of the appellants.

It is hoped that the foregoing explanation furnishes an adequate basis for the submission of the following brief as filed with the Circuit Court of Appeals in the *Baltimore and Ohio Railroad Company* case.

Brief Submitted as Amicus Curiae in the Baltimore and Ohio Railroad Company Case

INTRODUCTORY REMARKS

This brief is submitted on behalf of the Deutsche Bank in opposition to the requirement that the Railroad Company cancel upon its books some 70,000 shares of its common capital stock registered in the name of the Deutsche Bank and issue for those shares certificates registered in the name of the Alien Property Custodian.

The Railroad Company presents numerous points in its argument for reversal of the order and judgment below. The purpose of this brief is to emphasize what is believed to be the point of outstanding merit, with particular reference to the stock registered in the name of the Deutsche Bank. This point

is that the Custodian's right to certificates must rest on a seizure of right, title and interest in the stock, and there was no such seizure since the Custodian merely purported to seize such right title and interest as the Deutsche Bank had in the stock, and the Deutsche Bank had no right title or interest in the stock.

Since the Deutsche Bank, consistently with the answer of the Railroad Company, definitely disclaims any right title or interest in the stock, it may seem paradoxical that a brief should be filed on its behalf. The Deutsche Bank is concerned in the case solely for reasons which it deems to be of general business importance; and it therefore believes that a frank explanation of its position cannot be prejudicial to the side of the controversy which it supports. The nature of the Deutsche Bank's concern in the case will clearly appear in connection with the following statement of the case.

STATEMENT OF THE CASE.

Under Section 7 (c) of the Trading with the Enemy Act and Executive Orders relating thereto, the Alien Property Custodian was empowered to seize, actually or symbolically and by virtue of a mere demand therefor, any money or other property owing or belonging to or held for an enemy, where the Custodian after investigation determined that the money or other property was so owing or so belonged or was so held.

In May, 1918, the Custodian made the following determination:

> "I, A. Mitchell Palmer, Alien Prpoerty Custodian, * * * after investigation do determine

> that: Deutsche Bank is an enemy * * *, and has a certain right, title and interest in and to 74,126 shares of common stock standing in your [Baltimore and Ohio Railroad Company's] books in the name of Deutsche Bank,"

and at the same time, and by the same instrument, served on the Railroad Company, the Custodian made the following demand:

> "I, as Alien Property Custodian, do hereby require that you shall convey, transfer, assign, and deliver to me as Alien Property Custodian * * * every right, title, and interest of the said enemy in the said stock, including in respect to the said stock the right which the said enemy may have, (a) to receive all notices issued by you to the holders or owners of similar stock, shares, or certificates; (b) to exercise all voting power appertaining to such stock, shares, or certificates; (c) to receive all subscription rights, dividends, and other distributions and payments, whether of capital or of income, declared or made on account of such stock, shares, or certificates."

In this document of determination and demand were included certain administrative directions by the Custodian to the Railroad Company which will be referred to later. In April, 1925, the Custodian served a supplementary demand on the Railroad Company, which also will be referred to later.

The Deutsche Bank at no time had any right title or interest in the specified stock. Its sole connection with the stock was as follows, all of which appears from the answer of the Railroad Company. In 1903 the Railroad Company desired to broaden the existing market for its capital stock in Germany and other

European countries, and to this end sought to have its stock listed on the Berlin and other German stock exexchanges. To render the stock eligible for listing on the Berlin Exchange it was necessary that the stock be transferable by mere delivery, which requirement could be met by having stock registered in the name of, and endorsed in blank by, a German bank. Such an endorsement would provide practical assurance of the genuineness of the certificates, and would make the certificates readily negotiable by mere delivery. In order to accomplish this purpose, the Railroad Company entered into an agreement with the Deutsche Bank in 1904. Under this agreement holders of record of Baltimore and Ohio stock could have their stock transferred into the name of the Deutsche Bank, which bank would then endorse the certificates in blank and deliver them to the original owners or their nominees. Under this agreement the Railroad Company was to pay dividends on such stock by transmission to the Deutsche Bank of the amount corresponding to the amount of stock registered in the name of the Deutsche Bank at the respective dividend periods, the Deutsche Bank undertaking, for a commission payable by the Railroad Company, to advertise and distribute such dividends by payment to the holders of such certificates upon their presentation thereof. It was further agreed "that eventual capital repayments, or the exercise of rights on shares" standing in the name of the Deutsche Bank should be made at the office of the Deutsche Bank.

This was the sole connection of the Deutsche Bank with the stock in question. It did not represent the owners as agent, trustee, or in any other capacity. It had no right title or interest in the stock. Its name

appeared on the books solely for the purposes of this express agreement, which agreement was still in effect when the war between the United States and Germany commenced.

The foregoing facts are alleged in the answer of the Railroad Company, and therefore must be taken as true for the purposes of the present appeal.

These facts form the basis for the contention that there has been no seizure of the stock registered in the name of the Deutsche Bank.

These facts also disclose the nature of the Deutsche Bank's concern in the present litigation. Although it has no legal or equitable interest in the stock and although it is under no legal or equitable obligation to the true owners in the matter, nevertheless, since the Deutsche Bank entered into the above agreement with the Railroad Company in order that the stock might be to all intents and purposes transferable by reason of the Deutsche Bank's endorsement in blank, and since the certificates have accordingly been traded in, in a sense, upon the strength of the Deutsche Bank's name, the Deutsche Bank has a natural business concern in taking such steps as it properly may to protect what are deemed to be the legitimate interests of the true owners who have taken advantage of the agreement between the Deutsche Bank and the Railroad Company. This is the sole reason for the submission of this brief.

SUMMARY OF ARGUMENT

The argument will be presented under the following headings:

I. The Alien Property Custodian is Not Entitled to Certificates Representing the Stock Registered in the Name of the Deutsche Bank, Since the Custodian Never Made a Seizure of the Said Stock or of any Rights Therein.

A. The Alien Property Custodian Could Seize Ppoperty Only by Strict Compliance with the Provisions of the Trading with the Enemy Act and of the Executive Orders Issued Thereunder.

B. The Demand of 1918 Did Not Effect a Seizure.

C. The Demand of 1925 Did Not Effect a Seizure.

II. The Issue as to the Fact of Seizure of the Stock Registered in the Name of the Deutsche Bank is Properly Raised in This Proceeding.

III. The Order and Judgment of the District Court Should be Reversed.

ARGUMENT

1. THE ALIEN PROPERTY CUSTODIAN IS NOT ENTITLED TO CERTIFICATES REPRESENTING THE STOCK REGISTERED IN THE NAME OF THE DEUTSCHE BANK SINCE THE CUSTODIAN NEVER MADE A SEIZURE OF THE SAID STOCK OR OF ANY RIGHTS THEREIN.

A. The Alien Property Custodian could seize property only by strict compliance with the provisions of the Trading with the Enemy Act and of the Executive Orders issued thereunder.

It is to be noted in the first place that such rights as the Custodian now claims must necessarily be founded on a seizure of the property involved, strictly in accordance with the statutory authority given to the Custodian. Acts of the Custodian not done in strict conformity with the provisions of the statute are nullities and could vest no rights in him whatever. This is elementary.

Guaranty Trust Co. of New York v. Sutherland, 11 Fed. (2nd) 696 (no appeal taken);
In re Miller-Schaefer, 281 Fed. 764;
Miller v. *Rouse*, 276 Fed. 715;
Kohn v. *Kohn*, 264 Fed. 253;
Central Union Trust Co. v. *Garvan*, 254 U. S., 554;
Waldes v. *Basch*, 109 N. Y. Misc., 306;
Meares, Trading with the Enemy Act, 138.

This principle of course is not new. It was repeatedly stated by the United States Supreme Court in connection with the Civil War Confiscation Acts

which provided for the confiscation of property of persons acting in aid of the rebellion. The statute provided for a preliminary seizure followed by a judicial confiscation, and accordingly the Court said in *Brown* v. *Kennedy*, 15 Wall. 591, 597: "Seizure is essential to confer jurisdiction." See also *Alexandria* v. *Fairfax*, 95 U. S. 774. In *Tyler* v. *Defrees*, 11 Wall. 331, 346, the Court referred to various cases which had come before it involving the confiscation acts and said: "The Court have not hesitated, where there was a substantial departure from the mode of proceeding directed by the statute, to reverse the decree of the courts below in the cases which were here on error to those proceedings."

So far as the present case is concerned, the procedure necessary to effect a seizure is definitely prescribed. (a) There must be a determination, after investigation, of enemy ownership of the property to be seized; and (b) there must be at least a symbolical seizure of such property by demand therefor. (Section 7(c) of the Act. Executive Order of February 26, 1918, *Guaranty Trust Company v. Sutherland*, *supra*.)

This much the Custodian has not denied and cannot deny; nor will it be denied that there has been no determination or seizure except such as may be found in the "demands" of 1918 and 1925, served on the Baltimore and Ohio Railroad Company. It is therefore necessary to examine these demands to ascertain whether there has been any seizure by the Custodian to support the present proceeding.

B. The demand of 1918 did not effect a seizure.

The language of seizure did not in fact include any of the said stock. The demand of 1918, served on the Railroad Company, contains, in the first place, words of determination of ownership and words of seizure, and, in the second place, administrative directions. Obviously the words of determination of ownership and the words of seizure must be examined to ascertain what was seized.

The *determination* was that the Deutsche Bank, an enemy, had "a certain right, title, and interest" in the specified stock. The *seizure* was of "every right, title, and interest of the said enemy in said stock, including in respect to the said stock the right which the said enemy may have, (a) to receive all notices issued by you to the holders or owners of similar stock, shares, or certificates; (b) to exercise all voting power appertaining to such stock, shares, or certificates; (c) to receive all subscription rights, dividends, and other distributions and payments, whether of capital or of income, declared or made on account of such stock, shares, or certificates."

A "determination" that the Deutsche Bank has "a certain right, title, and interest" in specified stock is no determination whatever within the meaning of the Act. It is merely an assertion that the Deutsche Bank has *some* undefined interest in the stock, together with a definite failure or refusal to determine what the interest is. A determination that the Deutsche Bank has *some* interest but that the Custodian does not know what it is, is no determination. It frequently happens that one person has the right to vote certain stock while another person has the right to dividends.

But the Custodian did not determine that the Deutsche Bank had the right to vote; he did not determine that the Deutsche Bank had the right to dividends; he did not determine that the Deutsche Bank had even a right to registry of the stock in its name; nor did he determine that the Deutsche Bank had any other specified right. The Custodian's so-called determination is not a basis for seizing the right to vote, because he has not determined that the Deutsche Bank had the right to vote; it is not a basis for seizing the dividends, because he has not determined that the Deutsche Bank had the right to dividends; it is not a basis for seizing the right to registry on the books of the company, because he has not determined that the Deutsche Bank had the right to such registry; and much less is it a basis for seizing all interest in the stock, because he has not determined that the Deutsche Bank had the entire interest in the stock. If the Custodian could determine that the Deutsche Bank owned *some* of the various interests included in shares of stock and therefore seize all of the various interests, then with equal logic he could determine that an enemy owned some of the various property interests in the United States and therefore seize all property in the United States.

In the case of *Miller* v. *Rouse*, 276 Fed. 715, the Custodian determined that the enemy had "a certain right, title, and interest as beneficiary" under a specified will, and demanded such interest. The court held that this seizure was effective in substituting the Custodian in the place of the beneficiary, subject however to the usual judicial determination of the exact nature and extent of that interest under the will. The determination of the Custodian was deemed ade-

quate because the exact interest was limited by reference to the will. Similarly, in the case of *Kahn* v. *Garvan,* 263 Fed. 909, the enemy interest was likewise limited by reference to a deed of trust. (See also *Bendit's Estate,* 124 N. Y. Misc. 697). But in the present case there is no reference to any document in which the enemy interest is defined or by which the enemy interest could be ascertained.

It might be urged, upon the analogy of the *Rouse* and *Kahn* cases, that there was a sufficient determination in the present case. The argument would be that in the *Rouse, Kahn* and present cases there were determinations that the enemy had "a certain right, title, and interest" under a will, under a deed of trust, and in specified stock, respectively; that the enemy interest in the *Rouse* case was sufficiently defined by reference to a will upon which the usual judicial proceedings could be brought, in the *Kahn* case by reference to a deed of trust which likewise could be made the subject of judicial proceedings in order to fix the rights of the *cestui que trust,* and similarly in the present case by reference to the actual facts as to ownership which could be determined by proper judicial procedure.

Possibly this argument is a man of straw. It ought to be. But having set it up, it is submitted in the first place that a mere reference to undefined and unascertained and unlimited facts cannot be intelligently described as a determination of enemy ownership within the requirements of the Trading with the Enemy Act; and, in the second place, even if it could be called a sufficient determination, subject to a judicial determination of the actual facts of ownership, it would be necessary to reverse the court below because there has been no judicial determination of the actual facts—

and indeed the only relevant fact before the Court is the fact alleged in the answer, and necessarily accepted for the purpose of the present appeal, that the Deutsche Bank in actual fact had no right, title, or interest in the stock whatever.

Turning from the question of determination to the question of seizure, it is to be observed at the outset that there can be no seizure of property under the Act without a preceding determination of enemy ownership of the specific property seized. But assuming for the moment that the indispensable determination may be dispensed with, what did the Custodian seize? Having concluded, erroneously as now appears, that the Deutsche Bank had some undefined right title and interest in the stock in question, he demanded and thereby symbolically seized "every right, title, and interest of the said enemy in said stock, including in respect to the said stock the right which the said enemy may have," (a) to receive notices, (b) to vote, and (c) to receive dividends, etc. This is the entire extent of the seizure as fixed by the words of seizure contained in the demand.

Whatever construction may now be urged for this language, it would seem clear that the Custodian at the time intended to limit his seizure to such rights in the stock as the Deutsche Bank actually had. As the Court said in *Guaranty Trust Company* v. *Sutherland, supra,* referring to the executive order of February 28, 1918: "The executive authority thus lodged in the Custodian authorized him to qualify or limit any such demand in such manner and to such extent as he might in any case see fit." Accordingly, the Custodian, having merely found that the Deutsche Bank had some undefined right in the stock, apparently intended

to limit his seizure to such right, title and interest as the Deutsche Bank did in fact have, including therefore only such rights as the Deutsche Bank "may have" to receive notices, to vote, and to receive dividends, etc. It would seem clear that this was all that the Custodian intended to seize; but in any event it is all that he did seize if the clear and unambiguous words of seizure are to be construed in accordance with the commonly accepted significance of the words.

Giving the words of seizure their manifest meaning, and still assuming that the Custodian could dispense with any real determination of enemy ownership, it would obviously be necessary to ascertain what interest the Deutsche Bank had in the specified stock before the extent of the seizure could be determined. Since the Deutsche Bank, as alleged in the answer, had no interest whatever in the stock, nothing whatever was seized.

How is this analysis and argument met by the Court below and by the Custodian? The following arguments seem to have been advanced against the present contention: (a) The language of seizure covers the entire stock since it specifies in detail the rights which go to make up stock ownership; (b) the war power behind the Act is sufficiently broad to cover any lack of actual ownership by the Deutsche Bank; (c) the ambiguity in the language of seizure is clarified by the administrative directions contained in the "demand"; (d) and finally it is asserted that in any event the answer itself shows that the Deutsche Bank had at least the right to register the shares in its name. We shall take up these arguments in turn.

(a) *The argument that the language of seizure covers the entire stock since it specifies in detail the rights which go to make up stock ownership.*

The Court below set forth this argument in the following words:

> "It is apparent, however, when the determination and the demand of the Custodian, which constituted parts of one and the same document, as hereinbefore set out, are considered together, that the right, title and interest of the Bank [Deutsche Bank], which was determined and demanded by the Custodian, included all of the substantial rights of stock ownership, comprising as it did the right to receive notices from the Railroad Company to shareholders, the right to exercise the voting power of the stock, and the right to receive all distributions, whether of capital or income, declared or made on account of the stock."

It is respectfully submitted that this statement is incorrect. Upon the oral argument below and in the above quotation, it is believed that the Court overlooked the fact that there was not a demand for or seizure of the various rights above enumerated, but only a demand for and seizure of all such rights as the Deutsche Bank "may have."

If the Custodian had intended to seize the entire corpus of the stock, including all rights incident to complete ownership, as asserted by the Custodian and by the Court below, it would have been a very simple matter to choose language adapted to the purpose. It would merely have been necessary to omit from his actual demand the bracketed words below:

> "I, as Alien Property Custodian, do hereby require that you shall convey, transfer, assign, and deliver to me as Alien Property Custodian * * * every right, title, and interest [of the said enemy] in said stock, including in respect to the said stock the right [which the said enemy may have,] (a) to receive all notices issued by you to the holders or owners of similar stock, shares, or certificates; (b) to exercise all voting power appertaining to such stock, shares, or certificates; (c) to receive all subscription rights, dividends, and other distributions and payments, whether of capital or of income, declared or made on account of such stock, shares, or certificates."

It is respectfully insisted that the bracketed words clearly limit the seizure, as they were undoubtedly intended to limit it, to such rights as the Deutsche Bank actually had. It is difficult to see how an intention to so limit the seizure could have been expressed more clearly. With all respect to the Court below, we find it difficult to understand the above quotation from its opinion except upon the assumption that the Court overlooked the significance of the words above bracketed.

(b) *The argument that the war power behind the Act is sufficiently broad to cover any lack of actual ownership by the Deutsche Bank.*

This argument would be relevant if the Custodian had determined that the Deutsche Bank was the owner of the stock in question and had thereupon demanded the stock together with all rights incident to stock ownership. If the Custodian had made such a determination and such a demand, it is no doubt true

that the mere fact that the determination was incorrect would not invalidate the seizure. But the fact is that the Custodian made no such determination and no such demand or seizure. Since the Custodian only purported to seize such interest as the Deutsche Bank in fact had, it is wholly irrelevant that under the war power he might have gone further and have seized the entire interest in the stock on the basis of a mistaken finding that the Deutsche Bank had the entire interest. Of course, the breadth of the war power and the provisions of the Act have much to do with the question as to what the Custodian *could* have seized, but nothing to do with the question as to what he *did* seize within the limits of his authority.

(c) *The argument that the ambiguity in the language of seizure is clarified by the administrative directions contained in the "demand."*

In so far as the language of determination and seizure is concerned, the Custodian is apparently quite well aware of the weakness of his position. Referring to this language in his brief below, he conceded that: "It might be said that standing alone that section of the demand does not definitely define the extent of the interest of the enemy."

To meet this weakness he assumes without any stated basis therefor that the language of determination and seizure is ambiguous, and upon this nonexistent premise he asserts that the ambiguity is resolved or "clarified" by certain administrative directions annexed to the demand. Although the Court below does not appear to have followed the Custodian in this line of argument, it may be well to set forth

the exact wording of these administrative provisions. In the printed form of demand, after stating the determination and the demand or seizure based thereon, and after requiring that the "substance of this demand" be noted on certain corporate books and that the Railroad Company report its actions pursuant to "this demand," the Custodian adds the following administrative direction:

> "Until otherwise directed, you will remit to the Alien Property Custodian at Washington, by check payable to his order, all payments, whether of capital or income, now or hereafter declared or due on account of such stock, shares, or certificates, and you will direct such notices in respect to the said stock, shares, or certificates to the Alien Property Custodian."

This printed administrative direction is modified by a mimeographed rider (Form "APC-MM-188-Rev."), annexed to the demand, and reading as follows:

> "You are hereby instructed to remit all accumulated dividends direct to this office upon receipt hereof. If checks for accumulated dividends have heretofore been drawn in favor of the enemy and are now held by you, you may send such checks direct to this office. All future dividends shall be remitted to Maryland Trust Company as depositary for Alien Property Custodian, Trust No. F-665-C, which has been duly designated as the depositary of this trust.
>
> "You will also direct all notices hereby demanded, to said depositary and identify each notice by the trust number hereof."

These administrative directions are put forward by the Custodian as resolving the assumed ambiguity in

the language of determination and seizure and as showing that the Custodian really determined that the Deutsche Bank owned all rights in the stock and that the Custodian seized all rights in the stock.

The initial difficulty with this argument is that there is no ambiguity to be resolved or clarified. The Custodian merely determined that the Deutsche Bank had *a* right, title, and interest in the stock and thereupon confined his seizure to every right *of the said enemy*, including the right which the said enemy *may have* to receive notices, to vote, and to receive dividends, etc. It is a proper consideration, justified by judicial precedent, that the Custodian could very easily have framed his determination and demand to cover all rights and interests in the stock if that had been his intention. But he chose deliberately and unmistakably to limit his demand to such right, title and interest as the Deutsche Bank actually had in the stock. He could scarcely have expressed this limitation upon the extent of his seizure more clearly than by the words which he actually used. If such language occurred in a statute or a contract, probably no one would have the temerity to argue that it meant anything more than it apparently says.

Since the language which purports to set forth the determination and the seizure is not ambiguous, it follows under ordinary rules of construction that the Custodian cannot resort to other parts of the document to explain something which needs no explanation.

But even assuming that there could be said to be any ambiguity in the language of determination and seizure, the administrative directions referred to by the Custodian are altogether too negative in this re-

spect to resolve any such supposed ambiguity. That they *are* merely administrative directions, intended to apply only to such property as is covered by the preceding words of seizure, is too manifest for argument. It is true that one of these administrative directions, for example, reads as follows without any qualification if read by itself: "All future dividends shall be remitted to Maryland Trust Company as depositary for Alien Property Custodian." It would seem to be a very reasonable implication that this direction was intended to apply only to such property as was covered by the language of demand; and the force of this implication can hardly be questioned in the light of the sentence immediately following, which reads: "You will *also* direct all notices *hereby demanded,* to said depositary * * *." The only notices "hereby demanded" were those to which the Deutsche Bank was entitled.

It is respectfully submitted therefore that the Custodian's argument based on the administrative directions to the Baltimore and Ohio Railroad Company is too tenuous for serious consideration. If the Custodian attempts to administer more property than he has seized, the obvious solution is for him to restrict his administrative acts to the property seized and not attempt to broaden his seizure to cover everything which he may attempt to administer.

(*d*) *The argument that in any event the answer itself shows that the Deutsche Bank has at least the right to register the shares in its name.*

This argument is set forth in the opinion of the Court below in the following words:

"Manifestly the Custodian found the interest of the Bank in the stock broad enough to support the record title in its name. Moreover, if the averments of the answer are considered apart from the Custodian's determination and demand, it is clear that the Bank had the right to register the shares in its name, and that this right was included in the demand of the Custodian upon the Bank [*sic*, should be Railroad Company] to transfer to him its every right, title and interest in the stock."

If we may take the liberty of paraphrasing the Court's language we understand the reasoning to be as follows: (1) Even if it is necessary that there be a determination that the Deutsche Bank has some defined right in the stock, there was at least a determination that the Deutsche Bank had the right to have the stock registered in its name. (2) And even if the language of seizure is limited to such interest as the Deutsche Bank had, there was at least a seizure of the right of the Deutsche Bank to have the stock registered in its name. (3) Accordingly, even on the contention of the Railroad Company that there must be a determination of ownership of some defined right and a seizure of that specific right, the demand furnishes a sufficient basis for the relief now sought by the Custodian.

With all due respect to the Court below, it is submitted that this argument is insubstantial in so far as it relates to the Custodian's determination, that it is based on a definite misconception of the facts in so far as it relates to the seizure, and that the apparent conclusion is a *non sequitur*. We shall deal in turn with (1) the determination, (2) the seizure, (3) the conclusion.

(1) *The determination.* So far as appears from the record, the only fact upon which the Custodian based his determination was the registry of the stock in the name of the Deutsche Bank. Apparently because of this fact the Court assumes that the Custodian, in determining that the Deutsche Bank had a certain right title and interest in the stock, must at least have determined that the Deutsche Bank had the right to have the stock so registered in its name. It is a matter of common knowledge that stock frequently, in the ordinary course of business, remains standing in the name of a person who has parted with all interest therein. Upon a sale of stock, delivery of the certificate practically always precedes, by a more or less extended period, transfer upon the books. Accordingly, the mere fact of registry in a particular person's name is a small basis for an inference that the person has a legal right to have the stock registered in his name. If the Custodian had drawn this inference it would have been a very simple and natural thing for him to make his determination definite at least in this respect; but he did not do so—he contented himself with determining merely that the Deutsche Bank had *a* certain right title and interest. The only fair assumption is that the Custodian considered that the fact of registry was *some* evidence (even if rebuttable in fact) of *some* interest in the stock, and with the idea of reaching that interest, whatever it might be, simply determined that the Deutsche Bank had *some* interest, not realizing that the indefiniteness of such a "determination" might be regarded as invalidating it completely as a determination of ownership of any namable property or property right. The point here made is not that the mere fact of registry was necessarily an insufficient

basis for a definite determination by the Custodian, but rather that the Custodian in fact did not attempt to make any definite determination therefrom.

(2) *The seizure.* The Court argues, if we read the above quotation aright, that even if the Custodian only purported to seize such rights as the Deutsche Bank had, the seizure at all events covered the right to registry in its name since the answer shows that the Deutsche Bank had that right at least. The statement of the Court that from the averments of the answer "it is clear that the Bank had the right to register the shares in its name" is unquestionably incorrect. The Court does not cite the portion of the answer on which this statement is based, but presumably the Court had reference to the agreement between the Bailtimore and Ohio Railroad Company and the Deutsche Bank. This agreement, as well as the entire answer, will be searched in vain for any provision expressly or impliedly giving the Deutsche Bank the right to have any stock registered in its name. The agreement merely provided that the holders of record of Baltimore and Ohio stock who desired to render their stock tradeable on the German exchanges could, if they so chose, have their stock registered in the name of the Deutsche Bank, and have their new certificates endorsed in blank by the Deutsche Bank and redelivered to them. The Deutsche Bank had no *right* to registry in its name—it merely agreed to permit registry in its name for the purposes of the agreement. Nor did the Deutsche Bank have the right, once the stock was registered in its name, to have it remain in the Deutsche Bank's name. The true owner and holder of the certificate could at any time, without the

permission or knowledge of the Deutsche Bank, and merely by virtue of the blank endorsement, have the stock transferred on the books to his own name, and the agreement is so far from preventing this that it provides that there shall be no charge for such transfer on the books.

Accordingly, it is asserted, without fear of successful contradiction, that the answer definitely shows that the Deutsche Bank did not have the right to registry of any of the stock in question in its name. It is submitted that this alone definitely disposes of the argument of the Court as above quoted.

It may be appropriate at this point to emphasize the fact that the Deutsche Bank not only had no right to registry in its name, but had no right in the stock of any nature whatsoever. Its sole right under the agreement was a right, against the Baltimore and Ohio Railroad Company, to commissions on such dividends as it should distribute as agent for the Baltimore and Ohio Railroad Company. This right had no connection with the stock, and the Deutsche Bank had neither possession nor a lien upon the stock to secure its right to commissions. A careful reading of the answer will disclose the correctness of this statement, but two particular comments may be made.

In the first place, on the oral argument below it was suggested that the holders of certificates registered in the name of the Deutsche Bank did not have any right to vote because the stock was not registered in their names, and the Railroad Company expressed the opinion that the Deutsche Bank had no right to vote because it did not own the stock, its name being registered only for the purpose of the agreement.

The Court intimated that such a theory would enable the Railroad Company, by similar agreements, to destroy the voting power of all of its stock, from which the Court apparently suggested the conclusion that the Deutsche Bank must have the right to vote since the unregistered owners clearly could not vote. This was mere oral discussion and the Court has not set forth any such suggestion or argument in its opinion. However, it is deemed proper to point out that there was nothing unusual about the condition of stock registered in the Deutsche Bank's name but belonging to other parties who held the certificates. Since it is customary, upon the sale of stock, to make delivery of the certificates without regard to transfer upon the books of the Company, and since a period of time of greater or less extent always elapses before the purchaser or subsequent purchasers take the trouble to have the stock transferred on the Company's books, it follows that thousands of shares of stock are continually in substantially the same position as was the stock registered in the name of the Deutsche Bank. In the ordinary case, the Company would be justified and protected in recording the vote of the party in whose name the stock is registered regardless of assignments, but this provision is for the necessary protection of the Company, and does not confer upon such a person a legal right to vote in spite of his sale of the stock. And in the present case, it would seem clear that the Company would not even be protected if it should allow the Deutsche Bank to vote the stock, since the Company by its own agreement had registered the stock in the Deutsche Bank's name for purposes which precluded a right in the Deutsche Bank to vote the stock.

Furthermore, dealing with substance rather than shadow, it is clear that the certificate owners had the right to vote, just as any purchaser of a certificate has the right to vote. To be sure, it would be necessary for such certificate owner to comply with the regulations as to voting before he could actually cast his ballot; in other words, he would be obliged to have the stock transferred into his name on the books of the Company and he would be obliged to attend the meeting in person or by proxy. When a person has this underlying right and the means to vote by merely complying with the regulations for voting, it would hardly be said that he has no right to vote.

In the second place, the Deutsche Bank did not have even a bare legal title to the stock by virtue of the registry in its name. Certainly the Deutsche Bank's legal status, under its agreement with the Railroad Company, would not be superior to that of a registered owner who had sold his stock and delivered the certificate. Such a seller of stock, in spite of the continued registry in his name, would not have even a bare title. Thus, in *Johnston* v. *Laflin*, 103 U. S. 800, the Court held that the title, whether legal or equitable, it matters not, to shares of the capital stock of a national bank passes when the owner delivers his stock certificates to the purchaser with authority to him or any one whom he may name to transfer them on the books of the Company. In *McNeil* v. *N. Y. Tenth National Bank*, 46 N. Y. 325, in dealing with a certificate delivered to a purchaser but not yet transferred on the books of the Company, the Court said (p. 332):

> "The holder of such a certificate and power, possesses all the external indicia of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title, and the means of transferring such title in the most effectual manner."

Accordingly, it is clear that the Deutsche Bank had neither the right to registry of the stock in its name nor the right to vote the stock nor even a bare legal title. As heretofore stated, the only right which the Deutsche Bank had was a right against the Baltimore and Ohio Railroad Company to commissions on dividends distributed by it; but this right of course was not in any sense whatever a right in the stock.

(3) *The conclusion.* For the reasons stated above, it is submitted that the Court below was in error in its statement as to the determination and mistaken in its statement as to the seizure; but overlooking this, it is further submitted that the Court's apparent conclusion is at all events a *non sequitur.* Even if the Custodian had determined that the Deutsche Bank owned the right to registry in its name and even if the Custodian had thereupon seized this right to registry, there would be no basis for granting the Custodian's present demand, which is not merely for registry in his name, *but for delivery to him of the new certificates.* It is not suggested, and could not intelligently be suggested, that the Deutsche Bank had the right

to possession of any certificates under the facts alleged in the answer. Obviously, the true owners had the right to possession, and it would be absurd to suggest that the Deutsche Bank could have required such owners to turn their certificates over to the Deutsche Bank.

It is respectfully submitted therefore that the demand of 1918 contained no determination within the meaning of the Trading With the Enemy Act since there was no finding that the Deutsche Bank owned any defined property or property right; that the demand of 1918 effected no seizure because it only purported to seize such right in the stock as the Deutsche Bank had, and the Deutsche Bank had no rights whatsoever in the stock; and that the arguments to the contrary are without merit and are in large part based on a misconception of the facts alleged in the answer.

C. The demand of 1925 did not effect a seizure.

The power of the Custodian to seize enemy property ended with the Peace Resolution of July 2, 1921. It is believed that this statement will not be disputed, and it will therefore be sufficient to refer to Meares on Trading With the Enemy Act, page 140, *Miller* v. *Rouse*, 276 Fed. 715, and the very recent decision in *Guaranty Trust Company* v. *Sutherland, supra*, 11 Fed. (2nd) 696, in which the Court said:

> "It is at all times within the discretion and within the executive power to revoke prior action and to make a further demand but this must be made prior to peace between the countries. When the war ended, authority to do so ceased * * *. After the war ended and peace was restored, the

> Wiener Bank Verein was no longer an enemy but a citizen of a foreign country and the power to seize and sequester ended with the war * * *."

The Railroad Company contends that the demand of 1925 does at least demand one new right—a right which neither the Deutsche Bank nor any owner of the stock ever had and a right which never existed—namely, a right to new certificates without the surrender of the old certificates. The answer of the Custodian is that the underlying right to the stock was seized by the demand of 1918, and that the demand of 1925 merely takes advantage of the purely remedial provisions of the amendment of November 4, 1918.

The present brief does not enter into the merits of this controversy. Reliance is here placed upon the argument heretofore set forth that the demand of 1918 did not effect a seizure of anything whatsoever, and certainly effected no seizure of any right to certificates, new or old, with or without surrender of the old certificates. For the purpose of this argument, the demand of 1925 and the amendment of November 4, 1918, are of little importance, since the Custodian will hardly contend that they give him any rights if the demand of 1918 was ineffective.

II. THE ISSUE AS TO THE FACT OF SEIZURE OF THE STOCK REGISTERED IN THE NAME OF THE DEUTSCHE BANK IS PROPERLY RAISED IN THIS PROCEEDING.

The Custodian points to numerous decisions holding that proceedings under Section 17 of the Act, such as the present proceeding, are merely possessory and in aid of a previous seizure; that accordingly the ques-

tion of actual ownership of the property seized may not be raised in such a proceeding, the remedy of the aggrieved party being that provided under Section 9 of the Act. The correctness of such decisions is not questioned, *but they have no application to the present case in the absence of the previous seizure.*

If the Custodian had determined, however erroneously, that the Deutsche Bank owned the rights in the stock or even the right to registry in its name plus the right to certificates, and had thereupon made a corresponding seizure of those rights, respectively, it may be that the question of the correctness of the Custodian's determination would not be relevant in the present proceeding (although the Railroad Company contends that it would still be relevant).

But if the Custodian made no seizure, as herein contended, it is of course permissible to set forth in this proceeding the facts which establish that there was no seizure. If, as here contended, the Custodian seized only such rights as the Deutsche Bank in fact had, then it is clearly relevant in the present proceeding to show what rights the Deutsche Bank had or did not have in order to identify the exact property properly involved.

Thus the Court said, in *In re Garvan,* 270 Fed. 1002, an action under Section 17 of the Act: "The only issues involved according to the decision of the Supreme Court are as to the identity of the property and the persons and the actual making of the demand by the Alien Property Custodian."

The present answer raises an issue within these permitted issues. In referring to identity of property, the Court of course meant identity between the property or property rights which form the subject matter

of the proceeding under Section 17 and the property or property rights which were theretofore demanded and seized. In bringing an action under Section 17, it is certainly not sufficient for the Custodian merely to inform the Court that he desires certain property. He must at least show that he made a proper determination under the authority of the Trading with the Enemy Act, and a seizure under the authority of that Act, covering the specific property or property rights as to which he asks the aid of the Court under Section 17. There is no identity between the property sought by the Custodian in this proceeding and the property seized. The property sought by the Custodian in this proceeding is the entire property in the specified shares of stock; whereas the pleadings show that the Custodian never even purported to determine that this entire property was owned by the Deutsche Bank and never purported to seize this entire property, but only a qualified portion of it, which portion, as shown by the answer, was in fact (by virtue of that very qualification) no portion of the property whatever. Certainly the mere reference to the stock as a whole without a seizure of the stock as a whole does not create the necessary identity between the property now sought and the property heretofore seized; and the Railroad Company is therefore entitled to allege and put in issue the facts showing this lack of identity.

Substantially the same question arose in *Guaranty Trust Co.* v. *Sutherland, supra.* When the war commenced, the Guaranty Trust Company had a certain account outstanding with the Wiener Bank Verein of Austria. The Guaranty Trust Company reported the account showing the amount due to the Wiener Bank Verein as $6,000 (in round numbers), and the Custo-

dian demanded this amount which was accordingly paid over to him. After the end of the war, the Guaranty Trust Company discovered that the amount so reported as the balance due the Wiener Bank Verein was too small by $53,000. This fact was reported to the Custodian who thereupon, after the end of the war, made a demand for this additional balance to the credit of the Wiener Bank Verein. The District Court held that the original demand should be construed as covering the entire actual balance of the account, and accordingly that the Guaranty Trust Company should pay over this additional $53,000 to the Custodian; and that the Custodian's demand under Section 17 of the Act could not be resisted. Upon appeal the Circuit Court held that the original demand could not be extended beyond its terms; that therefore there had been no seizure during the war of the $53,000 additional credit now sought by the Custodian; and that the extent of the original demand could be inquired into in the proceeding under Section 17. The Court said:

> "A demand is the effective step and is essential before the appellee [Alien Property Custodian] may proceed under Section 17 of the Trading with the Enemy Act. In re Miller-Schaefer, 281 Fed. 764; Miller. v. Rouse, 276 Fed. 715. It is only after the demand is made that the possessor or holder of the property must comply with it. Central Union Trust Co. v. Garvan, 254 U. S. 554. * * *. The present proceeding is purely possessory in its nature. The decree being based upon the demand can be of no greater effect than the demand itself."

Accordingly, since the Custodian's demand was wholly ineffective in the present case, there can be no

decree in the Custodian's favor under Section 17 of the Act. Certainly the demand was ineffective to give the Custodian the right to possession of any certificates of stock, and the decree under Section 17 cannot go further than the demand.

While it is believed that the above authorities are conclusive on the question, it may be well to refer to an unconstitutional result of the Custodian's argument that, since the present proceeding under Section 17 is merely possessory the issue as to the exact extent of the original demand may not here be raised, but that any person aggrieved by the possession given to the Custodian under the decree now sought should assert his rights by proceeding subsequently under Section 9 of the Act.

If this contention were correct, then the following situation could arise, and would in fact exist in the present case. Assume that X, a German national, was one of the actual owners of one of the certificates registered in the name of the Deutsche Bank. The Railroad Company contends that the Custodian, by his original demand, seized only such rights as the Deutsche Bank had in the stock, and hence that there was no seizure of X's rights in the stock. The Custodian argued that even if the facts set up by the Railroad Company should be deemed to establish this contention, nevertheless the issue is not properly raised in this proceeding, and any aggrieved parties should be left to their remedy under Section 9. But X, being a German national, has no remedy under Section 9 (except to the limited extent provided by the Winslow Bill). Hence, if the Custodian's contention were correct, X would find himself deprived of his property by the decree now sought although

there was never any seizure of his property during the war or under the authority of the war power or under the authority of the Trading with the Enemy Act, and he would be without remedy since he could not file a claim under Section 9 of the Act. In other words, if, as shown by the facts alleged in the answer, there was no seizure of X's property during the war, the Custodian's contention that these facts are not relevant in this proceeding would result in a post-war seizure of the property of X, a citizen of a now friendly nation, and the subjection of the property to the provisions of a war Act under which X would be remediless. This result would unquestionably be unconstitutional. It necessarily follows that the issue as to whether there was any basic seizure of the property involved in a proceeding under Section 17 may properly be raised in such a proceeding.

A further incidental consideration may be mentioned at this point. It has been urged by the Custodian that the Railroad Company has no occasion or justification for resisting the Custodian's possessory demands since the Act would protect the Company with respect to issuance of certificates upon the Custodian's requirements; but it is to be observed that Section 7(e) of the Act protects the Railroad Company only in case the demand made by the Custodian is made under the authority of the Act. If the contention made in the present brief is correct, the Custodian's "demands" are not made within the requirements of the Act, and hence compliance with the Custodian's present demand for certificates would not protect the Railroad Company.

III. THE ORDER AND JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED.

For the reasons above set forth, if for no other reasons, it is believed that the decision of the Court below cannot stand. It is believed that the arguments here presented apply sufficiently to all the stock involved in this proceeding to render the decision below erroneous; but, in any event, it is submitted that there has never been any seizure whatever of any of the stock or of any rights in the stock registered in the name of the Deutsche Bank, and that the present possessory proceeding must therefore fail.

Conclusion With Respect to the Present Case.

Upon a trial of the issues raised by the answer of the *Great Northern Railway Company* in the present case, it would be open to the *Railway Company* to prove that shares of its stock, involved in this proceeding, have the same status in substance as the *Baltimore and Ohio Railroad Company* shares registered in the name of the Deutsche Bank. It is believed that the arguments above urged in the *Baltimore and Ohio Railroad Company* case apply with equal force in the present case, and should lead to a reversal of the decree of the District Court.

Respectfully submitted,

Harold W. Bissell,
On Behalf of the Deutsche Bank,
as *Amicus Curiae*.